136-519

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 264.

COLUMBUS THAW, PLAINTIFF IN ERROR,

vs

MARIA RITCHIE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 8, 1886.

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1 *Declaration & Notice to Plead. Filed Dec.* 12, 1882. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

COLUMBUS THAW, Plaintiff,
vs.
MARIA RITCHIE, Defendant. } Law No. 24092.

The plaintiff sues the defendant to recover one undivided half of that part of original lots one (1) and four (4), in square one hundred and sixty (160), in the city of Washington, in the District of Columbia, described as follows, to wit:

Beginning for the same at the southeast corner of said square and running thence west fifty (50) feet, thence north to the line of Rhode Island avenue; thence eastwardly with the line of Rhode Island avenue to the northeast corner of said square, and thence south to the place of beginning; of which the plaintiff was lawfully possessed heretofore, to wit, December 6, 1880, when the defendant entered the same and unlawfully ejected the plaintiff therefrom and unjustly detains the same from the plaintiff, who claims to be the owner of the same in fee simple.

2 And plaintiff claims the possession of said described premises, with the appurtenances and costs of suit.

And plaintiff sues the defendant to recover an undivided one-half part of that part of square one hundred and sixty (160), in the city of Washington, in the District of Columbia, contained within the following metes and bounds, to wit: Beginning for the same at the southeast corner of said square, and running thence west fifty (50) feet; thence north to the line of Rhode Island avenue; thence eastwardly with the line of said avenue to the northeast corner of said square, and thence south to the place of beginning; of which undivided half part the plaintiff claims to be the owner in fee simple, and of all of which said described real estate the defendant claims to be the sole and exclusive owner and possessor by title adverse to that of the plaintiff and disputed and denied the plaintiff's right and title to any part thereof and to any interest therein.

And plaintiff claims the possession of said described premises, with the appurtenances and costs of suit.

F. P. STANTON AND
S. R. BOND,
Pl'ff's Att'ys.

3 The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

F. P. STANTON AND
S. R. BOND,
Pl'ff's Att'ys.

4 *Summons to Answer Issued Dec.* 12, 1882.

In the Supreme Court of the District of Columbia, the 12th day of December, 1882.

COLUMBUS THAW, Plaintiff,
vs.
MARIA RITCHIE, Defendant. } At Law. No. 24092.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its first special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

F. P. STANTON,
S. R. BOND, *Attorney-*.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant the 12th day of Dec'r, 1882.

CLAYTON McMICHAEL, *Marshal.*

5 *Defendant's Pleas. Filed Jan.* 9, 1883. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

COLUMBUS THAW
vs.
MARIA RITCHIE. } At Law. No. 24092.

1st plea. For plea to the declaration in the above-entitled cause the defendant says that she is not guilty as alleged.

2nd plea. And for a further plea the defendant says the plaintiff is not seized of the parcel of land mentioned in said declaration and is not entitled to the possession thereof or any part or moiety thereof as claimed

APPLEBY & EDMONSTON,
Att'ys for Defendant.

6 *Joinder & Note of Issue. Filed Jan'y 9, 1883. R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

COLUMBUS THAW
vs.
MARIA RITCHIE. } Law No. 24092.

The plaintiff joins issue upon the defendant's pleas.

F. P. STANTON AND
S. R. BOND,
Pl'ff's Att'ys.

Please take notice that the issues joined in this cause will be tried at the next term of this court.

Yours &c.,

F. P. STANTON &
S. R. BOND,
Pl'ff's Att'ys.

To Appleby & Edmonston, Esq., def't's att'ys.

Note of Issue.

Pl'ff's att'ys, F. P. Stanton & S. R. Bond.
Def't's " Appleby & Edmonston.
Last pleading filed Jan'y 9, 1883.
Service of replication & notice of trial as within is hereby admitted Jan. 9, '83.

APPLETON & EDMONSTON,
Att'ys for Def'ts.

7 *Proceedings in Court. Mar. 24, 1885.*

Jury sworn and respited.

COLUMBUS THAW, Pl't'ff,
vs.
MARIA RITCHIE, Def't. } At Law. No. 24092. Cal., 117.

Now comes here as well the plaintiff, by his attorneys, Messrs. Stanton & Bond, as the defendant, by her attorneys, Messrs. Appleby & Edmonston, and a jury of good and lawful men of this District, to wit, James H. Paynter, John T. Costin, William T. Woods, James G. Gettinger, Byron S. Adams, Joshua Clark, Barney T. Swart, John M. Waters, Emanuel Gordon, Charles G. Thomas, Lambert T. Follansbee, and Robert E. Smith, who, being duly sworn to try the issues above joined, after hearing a part of the evidence, are respited until the meeting of the court to-morrow morning.

8 *Hearing Continued and Jury Respited. M'ch* 25, 1885.

COLUMBUS THAW, Pl't'ff,
vs.
MARIA RITCHIE, Def't. } At Law. No. 24092. Cal. 117.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

Jury Respited. M'ch 26, 1885.

COLUMBUS THAW, Pl't'ff,
vs.
MARIA RITCHIE, Def't. } At Law. No. 24092. Cal. 117.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

9 *Stipulation as to Docket Entries. Filed Mar.* 26, 1885. *R. J. Meigs, Clerk.*

It is hereby stipulated by the attorneys of the respective parties that in the trial of this cause or in the preparation of a bill of exceptions either party may introduce the docket entries or proceedings of any case arising in the late orphan's court or in this court sitting as an equity court or holding a special term for orphan's court business and which may have been brought under the act of Md. of 1798 on [or] the act of Congress of 1843, touching the sale of a part of an infant's estate for the purpose of the maintenance and education of such infant or infants, subject to any objection and exception as to its competency.

GEO. F. APPLEBY, *For Def't.*
S. R. BOND &
FRED. P. STANTON, *For Pl'ff.*

10 *Stipulation that Def't is in Possession, &c. Filed Mar.* 26, 1885. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

COLUMBUS THAW
vs.
MARIA RITCHIE. } At Law. No. 24092.

It is admitted upon the trial of this case that the defendant is in possession of the real estate and premises mentioned in the declara-

tion and holds and claims title to the same adversely to the plaintiff, and proof thereof is dispensed with.

GEO. F. APPLEBY, *For Def't.*
S. R. BOND,
FRED. P. STANTON, *For Pl'ff.*

11 *Verdict and Judgment.* *Mar.* 27, 1885.

COLUMBUS THAW, Pl't'ff,
vs.
MARIA RITCHIE, Def't. } At Law. No. 24092. Cal. 117.

Now again come here the parties aforesaid in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oaths say they find said issues in favor of the defendant; therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff the costs of her defence, taxed at $——, and have execution thereof.

12 *Motion for New Trial.* *Filed Mar.* 25, 1885. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia, the 28th day of March, 1885.

COLUMBUS THAW
vs.
MARIA RITCHIE. } At Law. No. 24092.

And now comes the plaintiff and moves the court for a new trial upon a bill of exceptions for errors of law by the justice presiding in his rulings during the trial, in admitting and excluding evidence and in his instructions and rejections of instructions prayed to the jury.

F. P. STANTON AND
S. R. BOND,
Att'ys for Plaintiff

13 In the Supreme Court of the District of Columbia.

COLUMBUS THAW, Plaintiff,
vs.
MARIA RITCHIE, Defendant. } At Law. No. 24092.

First Bill of Exceptions. *Filed Apr.* 25, 1885. *R. J. Meigs, Clerk.*

Be it remembered that on the trial of this cause the plaintiff, to maintain the issue on his part, offered and read in evidence the record in the office of the recorder of deeds of said District of conveyances of lots one (1) and four (4), in square one hundred and sixty (160), in the city of Washington, showing a chain of title from the United States to Joseph Thaw; which said lots include the real estate in question in this cause. The plaintiff also produced evi-

dence showing that Joseph Thaw died in 1840 seized of said lots, leaving a widow, Eliza V. Thaw, who was his second wife, and, among other children, two by her, the plaintiff, born in 1831, and his sister, Columbia Thaw, older than himself, since intermarried with one John Littell; that other children by his first wife survived him; that said Joseph Thaw left the following will, which was duly executed and probated in 1840, to wit:

"I, Joseph Thaw, of the city of Washington, in the District of Columbia, do, this twenty-sixth day of February, in the year of our Lord one thousand eight hundred — forty, make and publish this my last will and testament, which is as follows, namely:

Imprimis, I hereby appoint and constitute my beloved wife, Eliza Van Tyler Thaw, to be the guardian of my two youngest children, to wit, my daughter, Columbia Thaw, and my son, Columbus Thaw, and to act in trust for them in all things as fully as I would do if living.

Item. I give and bequeath to my said beloved wife Eliza all my property of every description, real and personal, to hold and enjoy during her natural life in trust for the equal benefit and maintenance of herself and of my daughter Columbia and of my son Columbus, the two children above named; and if either of them shall die before arriving at the age of majority, then she is to hold the whole property as above for the equal benefit of herself and the survivor of the two above-named children; or if both of the said children shall die before their mother, my said wife, then she, my said wife Eliza, shall hold the said property during her natural life for her own sole use and benefit, and in no case shall she, my beloved wife Eliza, be deprived of the use of any part thereof during her natural life for the maintenance of herself and of the two children aforesaid, while they or, of either, while either of them shall live, or of herself, while she shall survive them both.

Item. I give and bequeath to my two children above named, Columbia and Columbus, in equal parts, to their heirs and assigns forever, all my estate, real and personal, that shall remain at and after the death of their mother, my said wife Eliza, of it either of them shall not survive their mother, then I will that the surviving one shall have the whole.

Item. If both of my said children shall die before their mother, then, in the demise of the last survivor of them, I give and bequeath to my beloved wife Eliza, to her heirs and assigns forever, for her own proper benefit, all my estate of every description. I do, moreover, hereby constitute and appoint my beloved wife, Eliza Van Tyler Thaw, above named, the sole executrix of this my last

16 will and testament, and authorize her to administer and execute the same without giving security in any way whatever. Signed and sealed the day and year first above written.

JOS. THAW. [SEAL.]

The word 'die,' on first page, first interlined.

Witness:
O. B. BROWN.
SAM'L GRUBB.
JOHN McCLELLAND."

17 The plaintiff, for the purpose of showing a severance of the joint tenancy claimed to have been held by himself and sister in the property aforesaid, and that the defendant claims title through Joseph Thaw as a common source of title and claims adversely to the plaintiff, gave in evidence the record of a conveyance by said Columbia Thaw and one Henry Walker to Agricol Favier, dated May 16, 1848, of their interest in said lots; also conveyance, dated October 22, 1874, by Walter S. Cox, trustee, appointed in equity proceedings in said court, No. 1253, rules 5, for partition of the real estate of Agricol Favier, deceased, to Ebon C. Ingersoll, purporting to convey the whole of said lots one (1) and four (4); also conveyance from said Ingersoll, dated May 24, 1878, to Mary J. France, purporting to convey the whole of the real estate described in the declaration in this cause, and also the will of said Mary J. France, dated Nov. 26, 1880, duly executed and probated January, 1881, devising all her real estate to the defendant, Maria Ritchie.

The plaintiff further introduced evidence tending to prove that Eliza V. Thaw, the mother of plaintiff, died in February, 1866;

18 that the real estate in question is about 50 ft. by 200 ft. in extent and is worth about $2 per square foot, and that at the last-named date it was and has ever since been open ground without any fence, building, or other improvements and unoccupied until the defendant acquired her interest therein under the will of Mary J. France.

The plaintiff then proposed to prove the defendant's adverse possession, claim of title to and exercise of exclusive acts of ownership over the real estate in question; whereupon the following stipulation was signed by the counsel of the respective parties and was filed and read in the cause, viz:

"In the Supreme Court of the District of Columbia.

COLUMBUS THAW
vs.
MARIA RITCHIE. } At Law. No. 24092.

It is admitted upon the trial of this case that the defendant is in possession of the real estate and premises mentioned in the declaration and holds and claims title to the same adversely to the plaintiff, and proof thereof is dispensed with.

GEO. F. APPLEBY, *For Def't.*
S. R. BOND,
F. P. STANTON, *For Pl't'ff.*"

19 Upon cross-examination of the plaintiff, who had testified as a witness in his own behalf, the counsel for the defendant produced and offered in evidence the proceedings in the supreme court of said District, No. 2942, at law, being ejectment suit by said plaintiff and his sister Columbia against Louisa Favier *et al.*, as the heirs-at-law of Agricol Favier, for the real estate in question, instituted September 8, 1866, and dismissed March 18, 1867, and inquired of said witness if he had caused said suit to be brought, to which he answered that he had; and in answer to questions propounded by his counsel he testified that said suit had been brought in his behalf by Mr. —— Uttermehle, an attorney-at-law, since deceased; that the same had been dismissed without his direction or knowledge, and that he did not learn of such dismissal until about the time he consulted with Mr. Stanton, one of his present counsel, in regard to his title to the property, and which consultation led to the bringing of the present suit.

That he never paid any taxes on this property; that Walter S. Cox, trustee, first called his attention to this property;
20 shortly after the ejectment suit was instituted Mr. Cox showed him a deed made by plaintiff's mother; that plaintiff has lived in Washington all his life, and lived with his mother from the death of his father until his mother's death.

Here the plaintiff rested his case.

Thereupon the defendant, to sustain the issue on her part, offered in evidence guardian's docket No. 2, case No. 646, in the office of register of wills of said District, containing the following entries, to wit:

Eliza V. Thaw, guardian to Columbia Thaw & Columbus Thaw, orphans of Jos. Thaw.	Bond, M'ch 22, 1844, $725.00. H'y Walker, Jno. Walker, sureties. Trustee bond, 17 May, 1845, $750. H'y Walker, E. Walker, sureties.

Also chancery rules No. 4, case No. 344, of the late circuit court of said District, containing the following entries, to wit:

Eliza V. Thaw, guardian to Columbus and Columbia Thaw, infant children of Jos. Thaw, dec'd.	Petition ext. decree of orphans' court. 1844, Oct. 12—Decree affirming decree of orphans' court.

[On margin:] Carlisle, Oct. 12, 1844.

21 Also the following, being the only paper on file in the office of the clerk of said court in said case No. 344, to wit:

To the Hon. N. P. Causin, judge of the orphans' court of Washington county:

The petition of the subscriber respectfully represents that she has paid all the debts due by her deceased husband, Joseph Thaw, and that the property left by the deceased is insufficient to support her

and the children provided for in the will of the deceased, and a portion of the estate belonging to the deceased consists of two vacant and unimproved lots of ground situate, lying, and being in the city of Washington, in the District of Columbia, to wit: Lots Nos. one and four (1 & 4), in square number one hundred and sixty (160). Your petitioner respectfully prays that the court will deem it expedient and cause the said lots to be sold for the purpose of relieving the immediate wants of the petitioner and for the support and education of the children named in the will of the said Joseph Thaw, dec'd, and that an order may be granted for the sale thereof at an early a day as practicable; and, as in duty bound, will ever pray, &c.

ELIZA V. THAW.

29th March, 1844.

22 DISTRICT OF COLUMBIA, } *sct:*
Washington County, }

On this 29th day of March, 1844, personally appeared before the subscriber, a justice of the peace in and for the said county, Eliza V. Thaw, who, being duly sworn on the Holy Evangely of Almighty God, depose sand says that the facts contained in the within petition are true to the best of her knowledge and belief.

Sworn to before—

H'Y NAYLER, *J. Peace.*

Orphans' Court of Washington, D. C.

In the Case of the Petition of ELIZA V. THAW, Executrix and Guardian to Columbia and Columbus Thaw, Minor Children of Joseph Thaw, Deceased.

This case coming on to be heard in the orphans' court on the petition, exhibits, accompanying proofs, and representation of said Eliza V. Thaw in her capacity as guardian and executrix aforesaid, the same were by the court read and duly considered, and therefore it is by the said cou-t, this 29th day of March, 1884, ordered, adjudged, and decreed, provided that the circuit court of the District of Columbia for the county of Washington, sitting as a court of chancery, shall by its proper order in the premises approve thereof, that the
23 said guardian for the petitioner, minor children of said Joseph Thaw and herself, be, and she is hereby, authorized and empowered to sell the said real estate mentioned in said petition at public or private sale, after such notice by advertisement as she shall deem reasonable and sufficient, on the following terms, viz., either for cash or a credit, at the option of the said guardian, and on the full payment of the purchase-money and interest and on the ratification of the sale by this court to execute to the purchaser, his heirs or assigns, at his or their costs and request, a valid and sufficient deed of conveyance in fee simple of the said premises, with all the right and estate therein of the said Columbia and Columbus Thaw, minor children aforesaid, provided that the said guardian,

before proceeding to act hereunder, shall file with the register of wills her bond, with security, to be approved by the judge of this court in the penalty of seven hundred and fifty dollars, with the usual condition for the due and faithful performance of the trusts reposed in her as guardian of said children, and immediately after making said sale to report the same under oath to this court.

NATH'L POPE CAUSIN.

24 DISTRICT OF COLUMBIA, *Washington County,* } *To wit:*

I certify that the aforegoing is a true copy from the original filed and recorded in the office of the register of wills for Washington county aforesaid.

Witness my hand and seal of office this 29th day of April, in the year 1844.

[SEAL.] ED. N. ROACH,
Reg. of Wills.

25 Also certified copies of bonds of Eliza V. Thaw as follows, to wit:

DISTRICT OF COLUMBIA, *County of Washington,* } *ss:*

Know all men by these presents that we, Eliza Van Tyler Thaw, Henry Walker, and John Walker, are held and firmly bound unto the United States of America in the just and full sum of seven hundred & twenty-five — current money of the said United States, to be paid to the said United States, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, in and for the whole, jointly and severally, firmly by these —.

Sealed with our seals and dated this 22d day of March, in the year one thousand eight hundred and forty-four.

The condition of the — above-bounden Eliza Van Tyler Thaw, as guardian to Columbia and Columbus Thaw, orphans of Joseph Thaw, of Washington county, deceased, shall faithfully account with the orphans' court of Washington county, as directed by law, for the management of the property and estate of the orphans under her care, and shall also deliver up the said property agreeably to
26 the order of the said court or the directions of law, and shall in all respects perform the duty of guardian to the said Columbia and Columbus Thaw, according to law, then the above obligation will cease; it shall otherwise remain in full force and virtue in law.

ELIZA V. THAW. [SEAL.]
HENRY WALKER. [SEAL.]
JNO. WALKER. [SEAL.]

Signed, sealed, and delivered in the presence of—
JAS. PECK.
JAS. REILEY.

27 DISTRICT OF COLUMBIA, } *To wit:*
Washington County, }

Know all men by these presents that we, Eliza V. Thaw, Henry Walker, and John Walker, of the county and District aforesaid, are held and firmly bound unto the United States of America in the full sum of seven hundred & fifty dollars, current — of said States, to be paid to the said United States, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, in and for the whole, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of May, 1845.

Whereas Eliza V. Thaw, by a decree of the orphans' court of Washington county aforesaid and confirmed by an order of the circuit — of the District of Columbia for the county of Washington aforesaid, has been appointed trustee to sell the real estate of the late Joseph Thaw, mentioned in said order, for the support and maintenance of Columbia and Columbus Thaw, minors, as will more fully appear by the said decree, reference being thereto had:

28 Now, *now* the condition of the above obligation is such that if the above-bounden Eliza V. Thaw do and shall well and faithfully perform the trust reposed in her as trustee aforesaid by the said decree, or that may be reposed in *them* by any further decree or order in the premises, then the above obligation to be void; otherwise in full force and virtue in law.

ELIZA V. THAW. [SEAL.]
HENRY WALKER. [SEAL.]
JNO. WALKER. [SEAL.]

Signed, sealed, & delivered in the presence of—
JAS. PECK.

29 The defendant then offered and read in evidence to the jury the following certificate of H. J. Ramsdell, register of wills, under his hand and official seal, to wit:

"*Extract from the Proceedings of the Orphans' Court on Friday, January 21st,* 1848.

* * * * * * *

'Sale of real estate of Jos. Thaw, dec'd, filed. Order of approval filed.'

* * * * * * *

I hereby certify that the aforegoing is a true transcript of an entry in Liber E. N. R. No. 2 entitled 'Proceedings, 1846 to 1861,' being one of the records belonging to and in the office of the register of wills for the District of Columbia.

Witness my hand and the seal of the supreme court, holding a special term, this 20th day of February, A. D. 1885.

[Seal S. C. of D. C.]

H. J. RAMSDELL,
Register of Wills."

30 Also the following entries contained in a so-called scrap book in the office of the register of wills of said District, marked "E. N. R. No. 2," Proceedings, 1846 to 1861, to wit:

"FRIDAY, *January* 21, 1848.

* * * * * * *

Sale of real estate, Jos. Thaw, dec'd, filed; 'order of approval for' or 'order of approval filed,' the last word being indistinct and uncertain"

To the admission of each and every of said entries, papers, and proceedings the plaintiff, by his counsel, objected on the ground that the same are insufficient to show jurisdiction in the orphans' court to decree the sale of the interest of the plaintiff in and to the real estate in question and are incompetent; but the court for the time admitted the same, subject to objection, and, upon the further evidence hereinafter set forth and considered or incorporated herein, he overruled the objection and admitted the same in evidence; to which ruling the plaintiff, by his counsel, excepted, and prays the court to sign and seal this his first bill of exceptions, which is done accordingly, now for then, this 25 day of April, A. D. 1885.

D. K. CARTTER, [SEAL.]
Ch'f Justice.

31 *Second Bill of Exceptions.*

After the evidence set forth in the preceeding bill of exceptions, & which is to be considered as incorporated herein, had been given, the defendant then called as a witness R. J. Meigs, Jr., an assistant clerk of the supreme court of said District, who testified in substance that he had been such assistant clerk since the organization of said court in 1863; that the records of the old circuit court were in great confusion when the clerk of said supreme court took possession of his office; that there were 3 large boxes full of papers, which the witness and other assistants assorted as well as they could, and papers which members of the bar had at their offices were from time to time returned; that the said circuit court did not keep any book of extended orders, but kept a mere epitome of them; that the paper shown him, being the paper pertaining to case No. 344, and hereinbefore set forth, is the only one found on file in said clerk's office relating to said case.

32 William R. Woodward was then sworn and examined as a witness for the defendant and testified that he is a practicing lawyer in said District, the examination of titles being his special business; that he is the son-in-law of William Redin, deceased, who was a lawyer in said District, and that he knew Mr. E. N. Roach, who was formerly register of wills, and knows his handwriting. The scrap book in the office of register of wills, hereinbefore referred to, and the entries therein, to wit:

"FRIDAY, *January* 21, 1848.

"Sale of real estate, Jos. Thaw, dec'd, filed. Order of approval for" (or "filed")—

were shown the witness, and he testified that said entries are in the handwriting of said Roach; that the records of said orphans' court during the period from 1846 to 1860 were kept in a very confused manner, and that his recollection in regard to the said book called a scrap book is that the papers now bound in it were loose scraps of paper found in the office of register of wills and bound together afterwards. The entries appear to be consecutive, and among the loose papers were orders needed in examining titles.

The witness further testified that he searched among a large mass of papers left by Mr. Redin, who was auditor of the
33 court and a practicing attorney, and found a paper of Thaw to somebody. I think it was a paper of Favier's. It was an unrecorded deed, and I gave it to Judge Cox. He asked for it.

Moses Kelly, being next sworn and examined as a witness for the defendant, testified in substance that he succeeded Mr. Roach as register of wills of said district and served 8 or 9 months; that he found some confusion in the way the office had been kept; that the minutes or records were kept on loose pieces of paper and kept in a portfolio tied up with strings; that the records [illegible] very much behind, but he does not remember particularly in regard to papers relating to real estate; cannot say if any of the papers were missing; that the so-called scrap book or proceedings, E. N. R. No. 2, was not in the office when he was register of wills, but seems to contain the papers that were found loose in the office and kept in the portfolio.

George E. Johnson, a clerk in the office of the register of wills, being sworn and examined as a witness for the defendant,
34 testified in substance that the so-called scrap book or proceedings, E. N. R. No. 2, is one of the records of said office; that there is no other record of the proceedings of the court between the years 1846 and 1861; that he has examined the books and papers of the office relating to the sale of real estate by guardians; that the first record of such sales is 1865, and that from that date such a record has been kept, and that he could not find any record or paper relating to the sale of the real estate of Joseph Shaw other than the said entry in the so-called scrap book.

Upon cross-examination the said witness was asked if there were any guardians' accounts presented at any time to the orphans' court by Eliza V. Shaw, as guardian of Columbia and Columbus Shaw, to which he answered that there is a docket, called "the guardians' docket," in which such proceedings were entered at that time, and that if any such reports or accounts had been presented they should appear in said docket, and the said docket, being the same theretofore introduced in evidence by the defendant and
35 called guardians' docket No. 2, was then produced and shown the witness, and he testified that, though it contains numerous entries relating to proceedings of guardians from 1818 down to

1860, there is no entry in it in reference to the guardianship of Eliza V. Shaw except that set forth in the first above bill of exceptions in regard to the bonds as guardian and trustee; that said book does not contain the proceedings of the court in relation to real-estate transactions.

36 Mrs. Honorine Jardine was sworn and examined as a witness for the defendant, and testified, in substance, that she is the oldest child of Agricole Favier, who died in 1854. He was a Frenchman. He bought this property in controversy. Mr. William Redin, of Georgetown, was his legal adviser, and would come frequently to see her father, who owned and lived upon that part of square 160, west of lots 1 and 4. Mrs. Thaw, a widow, used to come to her father's house to try to sell him these lots in the same square. She looked to be in need. She begged her father to buy the lots in question, and her father did not want to buy them from her. She afterwards came with a boy and girl, the girl was taller than the boy, and her father said he would buy if she got a decree of the court. She got a decree of the court, and then her father purchased the lots from her. He then went into possession of the lots and expended a good deal of money. Her father put a fence around the whole square. He had a new invention of a pump which he put up on this property. It was some time in 1846,

37 but she could not swear to the month. A stable and gardener's house were built on part of lots 1 and 4, the same now in controversy. Cherry trees were planted on it. She lived with her father on the square. The home was burned down in 1856. It was enclosed when the Government took it at the beginning of the late war of the rebellion for keeping horses of the soldiers, and had always been enclosed prior to that time. Her father paid taxes on these lots from 1846 to his death and his heirs afterwards. He always claimed it as his property, having bought it, and his heirs afterwards claimed it as their property until it was sold to Mr. Ingersoll. When the troops left the property was nothing but stumps; all the fences were gone. The Government paid rent for it.

Mr. Redin had the care of all her father's papers. She saw the deed given by her father to Mr. Redin to have the same recorded. When her father died she was married; and when the heirs proposed to sell, Mr. Cox wanted the deed and came to her and asked if she had it. She thought it was probably at the city hall. He told her it was not there. She made search for several

38 months, and not finding it told Mr. Cox that it must be among Mr. Redin's papers; that Agricol Favier said he paid two (2) cents per square foot for the property.

The defendant then offered in evidence a certified copy from the land records of said District of a deed from Eliza V. Thaw to Agricol Favier in the following words and figures, to wit:

39 Eliza V. Thaw to Agricol Favier. } Deed. Recorded March 7th, 1867.

This indenture, made this seventeenth day of March, in the year of our Lord one thousand eight hundred and forty eight, between Eliza V. Thaw, of the city of Washington, in the District of Columbia, of the one part, and Agricol Favier, of the same city and District, of the other part, —: Whereas a decree was passed on the twenty-ninth day of March, in the year one thousand eight hundred and forty-four, by the orphans' court for the county of Washington, in the District of Columbia, upon the petition of Eliza V. Thaw, guardian of her infant children, Columbus and Columbia Thaw; and whereas the said Eliza V. Thaw was thereby appointed a trustee to sell lots numbered one and four, in square one hundred and sixty, in the city of Washington, which decree was on the twel-th day of October, in the year one thousand eight hundred and forty-four, confirmed by the circuit court for the county of Washington, sitting as a court of chancery, and the said Eliza Thaw having, in conformity with said decree, filed a bond with surities, which was approved by the said orphans' court, and having, in like
40 conformity with said decree, sold said lots above mentioned and reported the same to said court, which report was by said court, on the twenty-first day of January, in the year one thousand eight hundred and forty-eight, duly approved, ratified, and confirmed; and whereas the said Agricol Favier was the purchaser of said lots from her, the said Eliza V. Thaw, the trustee as aforesaid, under the power vested in her by the said decree:

Now, this indenture witnesseth: That the said Eliza V. Thaw, for and in consideration of the sum of —, lawful money of the United States to her in hand paid by the said Agricol Favier at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, and confirm, unto the said Agricol Favier, his heirs and assigns forever, two lots or parcels of ground situate, lying, and being in the city of Washington, in the District of Columbia, being lots numbered one (1) and four (4), in square numbered one hundred and sixty (160), as designated on plan of said city, together with all and singular the buildings, improvements,
41 ways, alleys, rights, members, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest, claim, and demand whatsoever, legal and equitable, of her, the said Eliza V. Thaw, as guardian and trustee as aforesaid and well as in her own right and of the said infant children, Columbus and Columbia Thaw, to the same; to have and to hold the said two lots or parcels of ground hereinbefore described and all other the premises hereby granted, bargained, and sold or mentioned or intended to be, and every part and parcel thereof, with their and every of their appurtenances, unto the said Agricol Favier, his heirs and assigns forever, to the only proper use

and behoof of the said Agricol Favier, his heirs and assigns forever; and the said Eliza V. Thaw doth hereby, for herself, *his* heirs, executors, and administrators, covenant and agree to and with the said Agricol Favier, his heirs and assigns, that she, the said Eliza V. Thaw, and her heirs shall and will at all times hereafter, at the request and cost of the said Agricol Favier, his heirs or assigns, do any further act the better to convey the said premises unto him which he shall or may require.

42 In witness whereof the said Eliza V. Thaw hath hereunto set her hand and seal the day and year first above written.

ELIZA V. THAW. [SEAL.]

Signed, sealed, and delivered in the presence of—
T. C. DONN.
JOHN L. SMITH.

DISTRICT OF COLUMBIA, *Washington County,* } *To wit:*

We, Thomas C. Donn and John L. Smith, justices of the peace in and for the county above named, do hereby certify that Eliza V. Thaw, a party to the aforegoing deed of indenture bearing date the seventeenth day of March, 1848, and hereunto annexed, personally appeared before us, in our county aforesaid, the said Eliza V. Thaw, being personally well known to us to be the person who executed the deed, and acknowledged the same to be her act and deed.

Given under our hands and seals this seventeenth day of March, 1848.

T. C. DONN, *J. P.* [SEAL.]
J. L. SMITH, *J. P.* [SEAL.]

43 The plaintiff, by his counsel, objected to the admission of said deed in evidence on the ground that Eliza V. Thaw had no power or authority to make the same under the will of Joseph Thaw, and that the alleged proceedings in the orphans' and circuit court are insufficient to authorize or support the alleged sale and conveyance, but the court overruled the objection and admitted said deed in evidence; to which ruling the plaintiff, by his counsel, excepted, and prays the court to sign and seal this his second bill of exceptions, which is done accordingly now for then this 25th day of April, A. D. 1885.

D. K. CARTTER, [SEAL.]
Ch'f Just.

44 *Third Bill of Exceptions.*

The defendant, after giving the evidence set forth in the preceding bills of exceptions to be considered incorporated herein, then offered and gave in evidence the proceedings in chancery cause No. 1253 of Jardine *v.* Favier for the sale of the real estate of Agricol Favier, deceased; also the deed from Walter S. Cox, appointed by decree in said cause trustee to sell said real estate, purporting to convey in

fee simple for $8,516 to Ebon C. Ingersoll said lots 1 & 4; also deed from said Ingersoll to Mary J. France, purporting to convey in fee simple to her for $9,021.47 the real estate in question in this cause, and the will of Mary J. France, devising in fee simple her real estate to the defendant, which said deeds and will are mentioned in the first bill of exceptions.

The defendant also produced evidence showing that Walter S. Cox, trustee, paid the taxes at that time due on said lots 1 & 4; that in 1882 and before the bringing of this action the defendant paid about $1,900 special taxes on the property in question, and it was shown in evidence that said property is worth over $12,000.

45 The defendant, in order to show to the court that the practice and proceeding under the act of Maryland of 1798 for the sale of real estate of infants for their maintenance and support had been, in numerous cases, both before and after the proceedings in said chancery cause No. 344, rules 4, which have been offered in evidence, substantially like the practice and proceedings in said last-mentioned cause, offered and read in evidence the docket entries in ten different causes brought between the years 1823 and Oct. 12, 1844, in the late circuit court of the District of Columbia in the chancery side thereof, and twenty-four different causes brought in the same court between Oct. 12, 1841, and April 21, 1852, in which causes the docket entries show that the practice and proceeding was similar to that pursued in said cause No. 344, a copy of which docket entries is herewith filed, marked "Exhibit M. R. No. 1," and to be taken as part hereof.

The defendant also offered and read in evidence the docket entries in twenty-six different causes in the equity side of the supreme court of the District of Columbia brought between

46 1863 and July 8th, 1865 (the numbers of which causes, the names of the solicitors bringing them, and the estates which were the subject of the decrees in the several causes are given in the paper herewith filed, marked "Exhibit M. R. No. 2," and be taken as part hereof), in which causes the docket entries show that the practice and proceeding was similar to the practice and proceeding in said cause No. 344.

The defendant also offered to read the proceedings set out at large in the records of the orphans' court of said District in numerous cases from 1865 to 1881, and did offer and read in evidence the proceedings in several cases selected at different periods between said last-mentioned dates, wherein the practice and proceeding was similar to that pursued in said cause No. 344.

And defendant offered to read and was about to read in evidence the docket entries in thirty-two other causes (the numbers of which and the names of the solicitors in which are given in said "Exhibit M. R. No. 1")—brought in the said circuit court between the

47 years 1852 and 1863—when it was admitted by counsel for plaintiff that the docket entries showed that the practice pursued in those cases was similar to the practice in said cause No. 344.

To the introduction of which said evidence the plaintiff, by his counsel, objected on the ground that it was incompetent and inadmissible, but the court overruled said objection and admitted said evidence; to which ruling of the court the plaintiff excepted and prays the court to sign and seal this his third bill of exceptions, which is done accordingly now for then this 25th day of April, 1885.

D. K. CARTTER, [SEAL.]
Ch'f Just.

48 For the convenience and to economize the time of the court, the following stipulation was made and filed in the cause, viz:

"It is hereby stipulated by the attorneys of the respective parties that in the trial of this cause or in the preparation of a bill of exceptions either party may introduce the docket entries or proceedings of any case arising in the late orphans' court or in this court sitting as an equity court or holding a special term for orphans' court business, and which may have been brought under the act of Md. of 1798 or the act of Congress of 1843, touching the sale of a part of an infant's estate for the purpose of maintainance and education of such infant or infants, subject to any objection and exception as to its competency.

GEO. F. APPLEBY, *For Def't.*
S. R. BOND &
FRED. P. STANTON, *For Pl't'ff.*

49 And the plaintiff, not waiving, but insisting upon his objection and exception in the said last bill of exception set forth, put in evidence and now introduces, under said stipulation, the following memoranda from the docket entries of cases in the supreme court of said District, sitting in equity, brought under said act of Congress of 1843, viz:

50		
Equity No. 5223 1876.	Mary Power, guardian, *vs.* Mary A. Power.	Bill for sale of real estate of infant for maintenance and education.
" 5477 1877.	Thos. E. Milstead, guardian, *vs.* Elizabeth H. Milstead *et al.*	Bill for sale of real estate of infants for maintenance & education.
" 5558	Barton Randolph, guardian, *vs.* —— Middleton *et al.*	Bill for sale of real estate of infants.
" 6270	John A. Borland *et al.*, executors & trustees for infants, *vs.* —— ——.	Bill of sale of infants' real estate to provide them a home out of proceeds.
" 6390 1878.	Catherine Doughty, guardian, *vs.* Catherine Doughty *et al.*	Bill for sale of real estate of infants.

	Equity	No. 6560	Martha B. Clark *v.* Arthur R. Clark,	Bill for sale of real estate of infant.
	"	6767	Isabella K. Thompson, guardian, *vs.* Wm. S. Thompson *et al.*	Bill for sale of real estate of infants for maintenance & to pay taxes.
	"	7022	Kate Marr, guardian, *vs.* Frank T. Barry *et al.*	Bill for sale of real estate of infant.
51	"	7137	Adelaide M. Townsend, infants by next friend, *v.* Chas. H. Townsend.	Bill for sale of real estate of infants.
	"	7299	Robert J. Isherwood, guardian, *v.* Joe. Haley *et als.*	Bill for sale of part of real estate of infants for maintenance.
	"	7376	E. B. Hay, guardian, *vs.* John A. Boyland *et al.*	Bill for sale of real estate of infants.
	"	7435	Rob't J. Isherwood, guardian, *vs.* Joel Haley *et al.*	Bill for sale of part of real estate of infants.
	"	7478	Mary H. Shoemaker, guardian, *vs.* Eliz. Shoemaker *et al.*	Bill for sale of real estate of infants for maintenance.
	" (1881.)	7704	Mary Power, guardian, *vs.* Mary J. Power *et al.*	Bill to sell real estate of infants.
	"	7707	B. B. Simmes, guardian, *v.* H. B. Fitzhugh *et al.*	Bill to sell real estate of infants.
	"	7723	Chas. Walter, guardian, *v.* Caroline Kraentler *et al.*	Bill for sale of real estate of infants.
	"	7748	Emma T. Magruder, guardian, *v.* Mary B. Suit.	Bill to sell real estate of infants.

Equity No.	7852	W. H. Barstow, guardian, *v.* Matthew Aiken *et al.*	Bill for sale of real estate of infants.
52 "	8762	Virginia S. Riley, guardian, *v.* Virginia S. Riley *et al.*	Bill for sale of real estate of infants.
"	8033	Nettie H. Redfield, guardian, *v.* Harriet F. Redfield *et al.*	Bill for sale of real estate of infants.
"	8157	Frances W. Eaton, guardian, *v.* Paul Eaton *et al.*	Bill for sale of part of real estate of infants for maintenance.
"	8557	Emma J. Winnigeder, guardian, *v.* W. B. Doughty *et al.*	Bill to sell real estate of infants.
"	8589	Geo. Callahan, guardian, *v.* Mary J. English *et al.*	Bill for sale of real estate of infants.
"	8871	W. Wheeler, infants by next friend, *v.* Harriet E. Wheeler *et al.*	Bill for sale of real estate of infants.
" (1884.)	9178	Louiza Riley, guardian, *v.* John W. Riley.	Bill for sale of real estate of infant.
"	9225	Francis Mason, guardian, *v.* Malvina Mason *et al.*	Bill for sale of real estate of infant for maintenance.
"	9188	Sarah A. Bohlick, guardian, *v.* John M. Abbott *et al.*	Bill of sale of real estate of infant for maintenance.

53 *Fourth Bill of Exceptions.*

After the evidence set forth in the preceding bills of exception, and which is to be considered as incorporated herein, had been given the defendant then offered in evidence a certified copy of a deed dated March 1, 1871, and recorded among the land records of said District May 2, 1871, the same being a deed of partition between Columbus Thaw, the plaintiff, and wife and Columbia Littell, his

sister, and John De Barth Littell, her husband, containing the following recital, to wit:

"Whereas Joseph Shaw, late of said city, by his last will and testament, bearing date on or about the twenty-sixth day of February, A. D. 1840, and duly admitted to probate, did bequeath and devise as follows, to wit:

"Item. I give and bequeath to my two children, Columbus and Columbia, in equal parts, to their heirs and assigns forever, all my estate, real and personal, that shall remain at and after the death of their mother; or if either of them shall (not) survive their mother, then I will that the survivor shall have the whole."

54 "And whereas their said mother, after disposing of the real estate acquired by said will and investing the proceeds thereof in other real estate more particularly described hereafter, died intestate, leaving the said devisees, Columbus Thaw and Columbia Littell, her sole heirs-at-law;

"And whereas the said devisees, having concluded and agreed to make partition of said real estate and hold the same in severalty, so that it shall not be subject in any way to their joint control or act, for that purpose they do hereby execute these presents."

And by which said deed part of lot 4, in square 427, was conveyed to Columbia Littell and part of lot 9, in square 370, was conveyed to Columbus Thaw.

To the admission of which said deed in evidence the plaintiff, by his counsel, objected on the ground that the same could not operate as an estoppel against the plaintiff and was not competent evidence in the case; but the court overruled the objection and admitted the same in evidence; to which ruling the plaintiff excepted, and prays the court to sign and seal this his fourth bill of exceptions, which is done accordingly now for then this 25 day of April, A. D. 1885.

D. K. CARTTER, [SEAL.]
Ch'f Just.

55 The defendant then rested her case.

Whereupon the plaintiff was recalled as a witness in rebuttal; upon being examined, testified against the objection of the defendant that a part of the real estate left by his father was the homestead located on New York avenue, the other part being lots 1 & 4, square 160, and that shortly before he became of age his mother and sister Columbia joined in the conveyance of the same to a Mrs. Tyson, and his mother gave a bond that he should confirm the sale as to his interest when he became of age, and that he did so; that the said property was sold for $2,700, and that out of the proceeds of the sale his mother purchased the two pieces of property described in said deed of partition for the sum of $1,000 each, and that it was the New York avenue property alone which was referred to in the deed of partition as having been disposed of by his mother; that his mother would not make an assertion that was not true.

And the plaintiff offered and read in evidence, from the land

records of said District, a deed dated Dec. 6, 1850, from Eliza
56 V. and Columbia Thaw to Rachel Tyson of lot 2, in square 251 (being on New York avenue), for an expressed consideration of $2,700; also a bond from Eliza V. Thaw and a surety conditioned that Columbus Thaw should ratify said deed and convey his interest in the property to Mrs. Tyson upon his becoming of age; also a deed from Zephaniah Jones to Eliza V. Thaw, dated Nov. 25, 1850, of part of lot 4, square 427, for an expressed consideration of $1,000, and a deed from said Jones to Eliza V. Thaw, dated Nov. 25, 1850, of part of lot 9, square 370, for an expressed consideration of $1,000.

The foregoing was all the evidence produced in the trial of the cause.

57 *Fifth Bill of Exceptions.*

Whereupon the plaintiff, by his counsel, prayed the court to instruct the jury as follows:

1. Under Joseph Thaw's will, during the life of Mrs. Thaw, his widow, she held the legal title to the real estate devised thereby for her life, in trust for herself and the two children, Columbia and Columbus, according to the terms prescribed in the will. The interest which Columbus Thaw took in the real estate under his father's will during the life of his mother was a remainder in fee after the termination of her life, and was not an estate in possession until after the death of his mother. The orphans' court had no power during Mrs. Thaw's life to decree the sale of the estate in remainder of Columbus Thaw. Her deed, therefore, purporting to convey said estate is void.

2. The Maryland act of 1798, chapter CI, sub-chapter 12, section 10, did not apply to remainders, and such estates of infants were not subject to sale on petition of the guardian to the orphans' court, with the approval of the court of chancery, as provided in said act.

58 3. The alleged entry in the records of the orphans' court, purporting to be of the date of January 21, 1848, in these words: "Sale of real estate of Jos. Shaw, Tec'd, filed. Order of approval for," is indefinite, uncertain, and insufficient to authorize Mrs. Thaw's deed, inasmuch as it does not state what sale or what real estate was sold, nor by whom, to whom, or for what consideration the sale was made, and inasmuch as no report of sale is shown and no guardian's account and no record evidence of any payment whatever, and the deed itself does not recite any consideration.

4th. The act of Congress of March 3, 1843, entitled "An act to provide in certain cases for the sale of the real estate of infants within the District of Columbia," repealed the Maryland act of 1798 so far as concerned the sale of the real estate of infants, and since that act of Congress was passed the real estate of infants could only be sold upon a bill filed therefor as prescribed by said act of Congress; and, as no such bill was filed in reference to the real estate in question, the deed of Eliza V. Thaw to Agricol Favier did not convey the interest of Columbus Thaw therein.

59 5th. The orphans' court of the District of Columbia, at the date of the proceedings therein relating to the sale of the real estate by Eliza V. Thaw, guardian, was one of limited jurisdiction, and a party claiming title to real estate under its proceedings must show affirmatively that it had jurisdiction, and that not having been shown in this case the deed from Mrs. Thaw to Agricol Favier did not convey the interest of the plaintiff in the real estate in question.

But the court refused to grant either or any of said prayers, but instructs the jury as shown in the succeeding bill of exceptions, to which refusal, as to each of said prayers, the plaintiff excepted and prays the court to sign and seal this his fifth bill of exceptions, which is done accordingly now for then this 25th day of April, A. D. 1885.

D. K. CARTTER, [SEAL.]
Ch'f Just.

60 *Sixth Bill of Exceptions.*

Thereupon the defendant prayed the court to instruct the jury as follows:

The power given to Eliza V. Thaw by will of Joseph Thaw, read in evidence; the petition of Eliza V. Thaw (the mother and guardian of the plaintiff), which was filed by her in the orphans' court and which has been offered and read in evidence; the order or decree of the orphans' court (which has been offered and read in evidence), made on said petition, &c.; the decree of the circuit court affirming the decree of the orphans' court, as shown by the papers and entries in cause No. 344, rules 4, which have been offered and read in evidence, and the giving of the bond as required by said orphans' court, and the sale, if made thereafter by said Eliza V. Thaw, as recited in the deed from her to Agricol Favier, which has been read and offered in evidence, and the ratification of said sale, if made as recited in said deed, and the execution and delivery of said deed, and the signing,
61 making, execution, and recording of the deed between the plaintiff and his wife and Columbia Littell and husband, which have been offered in evidence, are sufficient to constitute a bar to the recovery by the plaintiff in this action of any estate or interest acquired by said plaintiff under the will of Joseph Thaw, which has been offered in evidence.

2. The recitals in the deed offered and read in evidence from Eliza V. Shaw to Agricol Favier, if said deed was accompanied or followed by the possession of said Agricol Favier and those claiming under him, are evidence of the facts recited.

To each and all of which said prayers the plaintiff, by his counsel, objected, but the court overruled the objection and granted the same and said that there was no substantial disagreement between the parties as to the facts *that* that in overruling the positions taken in the law by the plaintiff the court was actuated by a single consideration that the plaintiff cannot prevail against the title that the defendant furnishes, and the court instructed the jury to find a ver-

dict for the defendant; to which said instruction the plaintiff
62 also objected, but the court overruled the objection, and the plaintiff prays the court to sign and seal this his sixth bill of exceptions, which is done accordingly, now for then, this 25th day of April, A. D. 1885.

D. K. CARTTER, [SEAL.]
Ch'f Just.

63 EXHIBIT M. R. No. 1.

Petitions (*Ch. Docket* 1.) *Filed Apr.* 25, 1885. *R. J. Meigs, Clerk.*

64 Wallach. 97.	1823. June 28.	Alex'r Extep & Barbara E-tep, guardians Washington Morin, 264, rules No. 1. petition for sale of land.	Petition, 7 exh'ts, — order of orphans' court for a sale. 1823, June.—Decree for sale, Hezekiah Langley, trustee. Final in this court.
Redin. 153.	1821. April 19.	Eliza Clark, guardian, etc., the heirs of Francis Clark.	Petition, 4 exh's, — order of orphans' court. Decree of confirmation for a sale. Closed in this court.
		Rules 3.	
C. Cox. 172.	1831. Oct. 26.	William Hayman, guardian of John W. Murdock and Margaret Murdock.	Record from orphans' court, with a decree for a sale. 1831, Oct. 26.—Decree approving of orphans' court decree.
		Chancery rules No. 4.	
May. 205.	1842. Jan'y 11.	Marion Slye and Georgnetta Slye, infant children of Robert A. Slye, deceased, by Roberta Slye, their guardian.	Petition & exhibits & decree of the orphans' court. 1842, Jan'y 11.—Decree approving of decree of orphans' court.
Bradley. 224.	1842. June 4.	Tobias Mixdorf, guardian of Tobias S. and Ann Mixdorf.	Petition, exhibit, and decree of the orphans' court. 1842, June 4.—Decree approving decree of orphans' court.
Wallach. 230.	1842. Aug. 13.	William H. Ivey, guard. of Philip D. Moss, infant child'n Philemon Moss.	Petition, ex., and decree of the orphans' court. 1842, Aug. 13.—Decree approving decree of orphans' court.
65 Hoban. 299.	1843. Dec. 16.	John W. De Krafft, guardian of John C. and Maria De Krafft.	Petition, exhibit, & decree of the orphans' court. 1843, Dec. 16.—Decree affirming decree of orphans' court.
R. Wallach. 304.	1844. Jan'y 4.	Alex. McIntire, guardian of Alex. McD. Haskell.	Petition, exhibit, — decree of orphans' court. 1844, Jan'y 4.—Decree affirming decree of orphans' court.
Carlisle. 344.	1844. Oct. 12.	Eliza V. Thaw, guardian to Columbus & Columbia Thaw, infant children of Jos. Thaw, dec'd.	Petition, exhibits, — decree of orphans' court. 1844, Oct. 12.—Decree affirming decree of orphans' court.
Linton. 396.	1845. Dec. 1.	Adeline Dyson, guardian of Margaret Dunbar and Robert Dyson, heirs-at-law of Geo. E. Dyson.	Petition, 5 exhibits, and decree of orphans' court. 1845, Dec. 1.—Decree approving decree of orphans' court.

Woodward. 397.	1845. Dec. 1.	Leonard Sloone, guardian of Levi, John, William, Susanna, Geo., & James L. Boose, child'n of John Boose, dec'd.	Petition, 1 exhibit, & decree of orphans' court. 1845, Dec. 1.—Decree approving decree of orphans' court.
Lenox, 398.	1845. Dec. 1.	Matilda Radcliff, guardian of Francis, Martha, Mary, & William Radcliff.	Petition, 2 exhibits, & decree of orphans' court. 1845, Dec. 1.—Decree approving decree of orphans' court.
66 Lenox. 399.	1845. Dec. 1.	John H. Hendley, guardian of George, Cecilia, & Sophia Hendley.	Petition, 3 exhibits, — decree of orphans' court. 1845, Dec. 1.—Decree approving decree of orphans' court.
Linton. 446.	1846. Dec. 17.	James Burdine, guardian of George Sheckells, Mary Ann Sheckells, and Rosaline Sheckells.	Petition, 3 exhibits, — decree of orphans' court. 1846, Dec. 17.—Decree affirming.
Carlisle. 450.	1847. Jan'y 9.	Sarah Voorhees, guardian of Eliza S., Martha M., Helen, & Catherine Voorhees.	Petition, aff'd., & decree of orphans' court. 1847, Jan'y 12.—Decree affirming, etc.
Lenox. 473.	1847. April 14.	Wm. T. Porter, guardian for sale of real estate of J. E. Porter.	Petition, 3 exhibits, & decree from orphans' court. 1847, April 14.—Decree affirming, etc.
R. Wallach. 502.	1847. 23 Oct.	Martha Langdon, guardian of Martha Ann, George T., James D., & Alex'r Langdon, heirs of Charles Langdon.	Petition, affidavit, and order of orphans' court. —, Oct. 26.—Decree affirming, etc.
Carlisle. 510.	1848. Jan'y 17.	Wm. G. Garsuch, guardian of John W., Sarah Jane, James S., Ann M., & Catherine Douglass.	Petition, affid., 2 ex's, & order of orphans' court. 1848, Jan'y 17.—Decree affirming, etc.
Linton. 535.	1848. May 17.	Mary F. Talbot, by her guardian, Jno. E. Ricards, Mary Carroll, & Mary Smith, heirs of Charles Talbot.	Petition, answer, & decree of orphans' court & one exhibit. 1850, June 11th.—Decree affirming decree of orphans' court.
67 Hellen. 550.	1848, Oct. 14.	Mary E. Dyer, guard. to Mary J. Dyer and John C. Dyer, heirs-at-law of Robert Dyer, dec'd.	Petition, aff'd., cert'f., & decree of orphans' court. 1849, Oct. 26.—Decree affirming decree of orphans' court.
Ennis. 561.	1848, 28 Nov.	David Welch, guardian to Mary, Catherine, & Margaret Welsh.	Petition, 3 exhibits, & decree of orphans' court.
W. S. Cox. 594.	1849, May 2.	Rules 5. William Goines, guardian of John W. Goines, heir-at-law of Janny Goines, dec'd.	Petition, certificate of orphans' court. 1849, May 2.—Decree affirming decree of orphans' court.
Lenox. 599.	1849, June 7.	Sophia Clements, guardian to Joseph A., James R., Harriet C., & Sophia A. Clements, children of Charles A. Clements, deceased.	Petition, ex., affidavit, & decree of orphans' —. 1849, June 7.—Decree affirming decree of orphans' court.

Woodward. 643.	1849, Dec. 11.	Zephaniah Jones, guardian to Vincent M. Burch, Geo. W. Burch, Wm. A. Burch, & Chas. B. Burch, infant children — Thomas Burch, dec'd.	Petition, ex., & decree of orphans' court. 1849, Dec. 19.—Decree affirming decree of orphans' court.
Lenox. 684.	1850, June 11.	Matilda Rudcliffe, guardian to Francis A. Rudcliffe and others, infant heirs to Wm. Rudcliffe, dec'd.	Petition, ex., & decree of orphans' court. 1850, June 11.—Decree affirming decree of orphans' court.
Wallach. 721.	1851, Feb'y 20.	Sarah A. Mount, guardian to Sarah E. Mount & James H. Mount, heirs-at-law of James Mount.	Petition, & exhibits, & decree of orphans' court. 1851, March 25.—Decree approving of orphans' court decree.
68 Abert. 744.	1851, Apr. 26.	Julia A. Janis, guardian of Joseph Janis & others, heirs-at law of Albert Janis, dec'd.	Petition, affidavit, & decree of orphans' court. 1851, Apr. 29.—Decree affirming decree of orphans' court.
Hall. 770.	1851, June 19.	Elizabeth Elliot, guardian — Robert & John Elliot, heirs-at-law of Jonathan Elliot.	Petition, ex., & decree of orphans' court; aff'd't. 1851, June 20.—Decree affirming decree of orphans' court.
Wallach. 780.	1851, Oct. 13.	Caroline Cox, guardian of Ellen Cox, Cornelius Cox, & Elizabeth N. Cox, infant children of Cornelius Cox.	Petition, record, & decree of orphans' court. 1851, Nov. 8.—Decree approving decree of orphans' court. 1852, March 23.—Petition, ex., record, & decree from orphans' court authorizing Caroline Cox, the trustee, to sell to James M. Carlisle, Esq., at private sale, lot No. 16, in sq. 552; aff'd't. 1852, Mar. 25.—Decree affirming decree of orphans' court for sale to Mr. Carlisle.
Ennis. 781.	1851, Oct. 13.	Edward Wilburn & Jane I. Wilburn, guardian of Marcellus and Francis Neale Holtzman, children of John Holtzman.	Petition, exh., & record & decree from orphans' court. 1851, Nov. 8th.—Decree confirming decree of orphans' court.
McKim. 795.	1851, Nov. 21st.	Mary Inch, guardian of Philip & Richard Inch, children of Philip Inch, dec'd.	Petition, exh's, & record & decree of orphans' court. 1851, Nov. 21.—Decree affirming decree of orphans' court.
Redin. 813.	1852, March 30.	Margaret I. Winship, guardian of Wm. W. Winship & others, minor children of Wm. D. Winship, dec'd.	Petition, exhibits, record, & decree of orphans' court. 1852, March 30.—Decree confirming decree of orphans' court.
Bradley. 826.	1852, April 20.	Mary Miller, guardian of Joanna Elizabeth Miller & others, infant children of William Miller, dec'd.	Petition, exhibits, record, & decree of orphans' court. 1852, April 20.—Decree confirming decree of orphans' court.
69 Wallach. 861.			
Redin. 880.			
Morgan. 919.			

Abert. 922.			
Morgan. 1011.			
Laskey. 1049.			
Laskey. 1048.			
70 Nourse. 1070.			
Lloyd. 1080.			
Lloyd. 1082.			
Laskey. 1083.			
Masin. 1126.			
P. B. Smith. 1156.			
Martin & Lloyd. 1177.			
71 Stone. 1272.			
Ennis. 1268.			
Ennis. 1274.			
Lloyd. 1327.			

Lloyd. 1378.			
Carrington & Lloyd. 1391.			
Carlisle & Maury. 1394.			
72 Carrington & Lloyd. 1455.			
Ennis. 1464.			
Norris. 1562.		Rules 6.	
Cox & Morgan. 1568.			
Ennis. 1590.			
———. 1593.			
———. 1630.			
73 Carrington & Lloyd. 1633.			
Jackson. 1668.			
———. 1673.			
W. S. Cox. 1815.			

		Docket 7.	

74 EXH'B'T M. R. No. 2" TO PL'FF'S BILLS OF EXCEPTIONS. Filed Apr. 25, 1885. R. J. Meigs, Clerk.

"*Exhibit M. R. No. 2.*"

Docket 7, sup. court District of Columbia.

No.	(Name of solicitor.)		
15.	David A. Burr.		
16.	" "		
24.	Walter S. Cox, Addison estate; Cartter, judge.		
28.	Blount.		
60.	"		
61.	"		
90.	"		
91.	R. J. Brent,	*in re* estate of	McSherry.
117.	D. A. Burr	" "	Fitzgerald.
136.	A. Lloyd	" "	Geo. V. & Ella King.
158.	E. C. Morgan	" "	Mohun.
165.	E. M. Bartholow	" "	Hanson Barnes.
171.	Wm. Philip	" "	Van Ness.
172.	T. M. Blount	" "	Ellen Anderson.
173.	" "	" "	Thos. S. De Vaugh.
224.	Sam'l L. Phillips	" "	Jno. R. McGill.
252.	M. F. Morris	" "	M. J. Queen.
300.	T. M. Blount	" "	Jno. T. Killmon.
313.	J. Pigat	" "	Wm. A. Richardson.
345.	A. Lloyd	" "	Jno. E. Hilton.
351.	"	" "	Patton.
386.	F. Schmidt	" "	Joseph Kuhn.
395.	D. A. Burr	" "	Matt. Cullen.
399.	Eugene Carusi	" "	Dennis Shenahan.
436.	D. A. Burr	" "	Ephraim B. Podbird.
467.	Sam'l L. Philips	" "	Henry W. Queen.

(This last case is of date of July 8th, 1865.)

75 *Decree, General Term. Jan'y* 25, 1886. 5 *M. G. T., p.* 323.

COLUMBUS THAW *vs.* MARIA RITCHIE. } 24092. At Law.

This cause having been argued and submitted to court upon the record of the special term, it is thereupon by the court here considered that the judgment of the special term be, and it is hereby, reversed with costs to be taxed by the clerk, and the cause is remanded to the special term to be tried anew.

76 *Motion for a Reargument. Filed Jan.* 28, 1886. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia. In General Term.

COLUMBUS THAW, Plaintiff,
vs.
MARIA RITCHIE, Defendant. } At Law. No. 24092.

The defendant moves for a reargument of the above-entitled action and appeal before a full bench of the court in general term.

The grounds of this motion are the following, viz:

1st. Because the questions involved are questions of law of great and general public interest, as will appear by reference to the record in this case.

2d. Because the questions involved require the consideration, for the purpose of repeal or affirmance, of a practice on which the validity and stability of numerous titles to real estate depend, and which practice was followed in the late circuit court of the District of Columbia from 1820 to 1863 and has been followed by all the judges of this court since its organization, excepting the judges (one of the judges) who have decided the appeal in this case, as will appear by reference to the record in this case and the cases referred in said record.

77 3d. Because, as will appear from the record in this case, the late circuit court and this court in a series of cases, numbering from 1820 to July 8th, 1865 (ninety-one cases), followed the practice adopted in the case at bar in approving the order for sales of the real estate of minors to be made by their guardians under the order of the orphans' court under the act of Maryland, 1798, chapter 101, sub-chapter 12, section 10, and in all these cases the state of the records is similar to the record of the sale, the validity of which is called in question in this case.

4th. Because, as will appear from the record in this case, this court in a series of cases from 1865 to 1881 followed the practice adopted in the sale, the validity of which is questioned in this case.

5th. Because, as will appear from the record in this case, the devisor of defendant purchased the property in suit in 1878 after the practice now called in question had continued for more than fifty years and had received the sanction and approval by judicial decision of every judge who had been on the bench during that period, and had been adopted and recognized as valid by most, if not all, of the members of the bar; and it is known almost judicially that titles dependant upon this practice were passed

78 as valid by attorneys who examined and passed upon the titles to real estate.

6th. Because to decide now against the practice followed in the sale called in question in this case and to hold that either the act of 1798 referred to did not authorize the practice or, if it did, that that act was repealed by the act of 1843, referred to in the record, and that all sales of the real estates of minors by their guardians

made by order of the orphans' court, with the approval of the circuit court, since the act of 1843 are invalid would annul titles that have passed in more than a hundred cases and would involve probably more than a thousand distinct holdings of title (for many of the cases involve a number of lots or large tracts of land which have since passed to different holders).

7th. Because the judgment of reversal or the ordering of a new trial is by two judges only (the case having been heard by two judges), and it is well known that the views of the chief justice who tried the case below, as far as the practice involved is concerned, are shared by other members of the court.

79 The chief justice sat in the trial of the cause below because Judge Cox was counsel in 1866 for the then holders of the titles assailed in this case. The record shows that Judge Cox followed the practice in other cases; that the late circuit court, when Judge Merrick was on the bench, followed the practice, and that the general term, in the case of Mansel (see *In re* Mansel), decided December, 1874, consisting of Judges Olin, Wylie, and MacArthur, approved the practice and assumed it to be unquestioned.

The chief justice was asked by Mr. Appleby, counsel for defendant, to assign a third judge in addition to the two on the bench, who have decided the case prior to the argument of the case, the request of counsel being based upon the fact that the case embraced matters of great importance as to practice and as to title to real estate. The case was fixed for the argument thereof by the court at the instance of the plaintiff's counsel and without consultation by plaintiff's counsel with the defendant's counsel.

8th. Because the validity of the defendant's title has been sustained by two justices of the court—by Justice Wylie in equity cause 6930 and by the chief justice, who tried the case in the court below.

APPLEBY & EDMONSTON,
Attorneys for Defendant.

80 I hereby certify that this case was fixed for argument by pl'ff's counsel appearing in court, as I have been informed, and having a day fixed by the court without knowledge thereof on the part of the defendant's counsel, and that as soon as defendant heard of this action by the court I went to the chief justice and asked him to have Mr. Justice Merrick and Mr. Justice MacArthur, or at least one of them, sit on the bench during the argument in general term; that the chief justice told me that Judge Merrick could not be well called away from the circuit court nor Judge MacArthur from the criminal court, and on this response by the chief justice I told him that the case was of too much importance to the bar generally to be decided by two judges, especially as Judge Hagner had expressed himself, whilst on the bench in a case which Mr. Garnett had, as being opposed to the practice which has so long prevailed in the District, and which is assailed for the first time in this case, so far as I have ever heard.

GEORGE F. APPLEBY.

81 I hereby certify that at the hour of 3.20 p. m., Thursday, Jan'y 28th, at his office on 4½ St., Washington, D. C., I served a copy of the above motion and certificate of Geo. F. Appleby on S. R. Bond, att'y for the plaintiff.

WM. WARD MOHUN.

82 *Certificate of Pl'tf'f's Counsel in re Motion for Rehearing.*
Filed Feb. 10, 1886. *R. J. Meigs, Clerk.*

Supreme Court of the District of Columbia. In General Term, February 9, 1886.

In the matter of the motion for a rehearing.

COLUMBUS THAW
vs.
MARIA RITCHIE. } At Law. No. 24092.

The undersigned, counsel for the plaintiff in this case, expressly deny that any advantage was taken of the counsel for the defendants in setting this case for argument, as would seem to be implied by the certificate of Mr. Appleby appended to his printed motion. On the contrary, we understood that the case was postponed at least once for the accom-odation of the defendant's counsel. The case was not argued until the very last days of the term, when it had been reached in its order, and the defendant's counsel did not make any complaint or objection, but proceeded with the argument upon a most elaborate brief and occupied about four hours in their address to the court.

We heard no suggestion from the defendant's counsel that they desired the presence of other judges to sit in the case; but one of us (Mr. Stanton) did make the suggestion that at least one other judge would be desirable in the hearing of the case. It was
83 suggested, however, from the bench that two judges constituted a quorum and it was not our right to demand more, the other judges being occupied with their respective duties in other courts.

Moreover, we state that we had nothing whatever to do with the question as to what judges should sit in the hearing. C. J. Cartter was disqualified by law and Justice Cox, having been once interested in the subject-matter involved in the case as counsel for Favier, with proper delicacy, refused to sit on the trial of the case below, and, of course, could not sit on the hearing in this court.

FRED. P. STANTON.
S. R. BOND.

84 *Rehearing Granted. Feb'y 15th,* 1886. 5 *M. G. T., p.* 341.

Rehearing ordered.

COLUMBUS THAW
vs.
MARIA RITCHIE. } 24092, Law.

It is now here ordered, Justice Hagner concurring therein, that this case be heard anew, and Justice Hagner retires from the bench.

85 *Exh'b't to Opinion. Filed Mar.* 27, 1886. *R. J. Meigs, Clerk.*

To the honorable the judges of Cecil county orphans' court:

The petition of John Gottier, guardian and father of Francis Gottier and Elizabeth Gottier, of Cecil county, respectfully showeth that in the year of our Lord eighteen hundred your petitioner was married to a certain Elizabeth Booth, by whom he had the aforementioned children, Francis and Elizabeth; that some time after the birth of the last your petitioner's said wife deceased, and since that time, to wit, on or about fourteen months ago, the said children became intitled by the death of Jonathan Booth, a cousin of the wife of your petitioner, to one-ninth part between them of a certain grist mill and about one hundred and forty acres of land adjoining it in the county aforesaid; that the other heirs-at-law of the said Jonathan Booth consulted with your petitioner and concluded that a sale of the said mill and lands would be highly advantageous to all the persons interested, whereupon they proceeded to contract for the sale thereof with a certain Alexander Scott, of the county aforesaid, for the sum of six thousand four hundred twenty-four dollars
86 & twenty-five cents, provided your petitioner should be able to convey his children's part. Now your petitioner begs leave to state that he verily believes such a sale will much promote the interest and welfare of his said children and enable him to educate and support them more to their advantage than if no such sale were to be made. He therefore prays your honorable body to order that he may be able to make the necessary conveyance; and, as in duty bound, he will, &c.

JOHN GOTTIER.

By the Orphans' Court. Dec. 12th, 1810.

On due consideration of the allegations contained in the within petition the court is of opinion that the sale prayed for is to the advantage of the aforesaid Francis and Elizabeth and should be confirmed, and that the petitioner, John Gottier, be authorized to make conveyance of that part of his wards' real estate which they have by de-cent from their cousin, Jonathan Booth, and mentioned in the within petition.

In testimony whereof I have hereunto set my hand and
[SEAL.] seal of office this twelfth day of December, in the year of our Lord eighteen hundred and ten.

DAVID SMITH,
Reg. Test. Com'r C. Co.

87 In Chancery. December 18th, 1810.

Under power vested in this court by the act of 1798, 101 h., 12, sect. 7, the above order of the orphans' court is approved.

W. KILTY, *Ch'r.*

LAND OFFICE OF MARYLAND, *sct:*

I certify that the aforegoing is a true copy of the original on file in this office.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of the land office of Maryland this twentieth day of November, eighteen hundred and eighty-five.

J. THOMAS SCHARF,
Com'r of Land Office.

88 In the Supreme Court of the District of Columbia. In General Term, January 25, 1886.

COLUMBUS THAW
v.
MARIA RITCHIE. } At Law. No. 24092.

Opinion by HAGNER, *Justice:*

This is an action of ejectment to recover an undivided moiety of two lots in square 160, in Washington city. The plaintiff claimed under the will of his father, Joseph Thaw, admitted to probate in 1840, which devised all his estate, including these lots, to his wife, Eliza V. Thaw, for life, in trust to apply the income of the property to the maintenance of herself and their two youngest children, Columbia Thaw and Columbus Thaw, the plaintiff. In the event of the death of the children their interests were to devolve upon the widow, and upon her death the whole estate was to belong to the children equally. The widow died in February, 1866. Columbia Thaw, in May, 1848, executed a conveyance of her interest to Agricol Favier. At the trial in the circuit court the plaintiff offered in evidence the will and proved the foregoing facts, and there rested.

The defendant claimed title through mesne conveyances from Favier. He had purchased the lots from Mrs. Thaw, who claimed the right to sell under a decree of the orphans' court of the District of Columbia of 29th March, 1844, which was "affirmed" by the circuit court, 12th October, 1844. Favier received from her a conveyance dated 17th March, 1848, which was not recorded until March 7, 1867.

To sustain this defence the defendant offered in evidence guardian's docket No. 2, case No. 646, in the office of register of wills, containing the following entries, viz:

"Eliza V. Thaw, guardian to Columbia Thaw and Columbus Thaw, orphans of Jos. Thaw.

Bond, M'ch 22, 1844, $750.00.
H'y Walker, Jno. Walker, } Sureties.
Trustee bond, 17 May, 1845, $750.00.
H'y Walker, E. Walker, } Sureties."

89 And the followings entries contained in a book in the office of register of wills called a "scrap book" and marked E. N. R. No. 2., Proceedings 1846 to 1861, viz:

"Friday, January 21, 1848. 'Sale of real estate, Jos. Thaw, dec'd, filed.' 'Order of approval for' or 'order of approval filed;'" and also read the two bonds referred to in the entries, which were the only papers in that court connected with the guardianship or property. She also offered to read from chancery rules No. 4, case No. 344, of the late circuit court of said District the following entries, viz:

"Eliza V. Thaw, guardian to Columbus and Columbia Thaw, infant children of Jos. Thaw, dec'd.	Petition ext. decree of orphans' court. 1844, Oct. 12, decree affirming decree of orphans' court."

She also offered to read the only paper remaining in the circuit court referring to this case, which was a copy of the petition of Eliza V. Shaw to the orphans' court asking for authority to sell these lots, and of the order of that court of the same date authorizing the sale certified by the then register of wills.

To all this testimony the plaintiff objected, and it was admitted provisionally. The defendant then offered testimony to show the disorderly condition of the records of the old circuit court and of the orphans' court before 1863; that Favier and those claiming under him had been in possession of these lots from about 1846, and had paid the taxes upon the property; and also offered evidence of the conveyances from Favier and through his grantees to the defendant. She then proposed to show what had been the practice in the orphans' court and circuit court for many years by proof of the passing by those courts, in numerous cases, of similar decrees of sale of the real estate of infants; and thereupon the presiding justice overruled the objection to the evidence first offered as aforesaid, and admitted the same with all the other proof. From this ruling, as to the admissibility of testimony, and to other rulings upon the prayers upon both sides the plaintiff excepted; and, the verdict being for the defendant, upon the instruction of the court the present appeal was taken.

The case was argued at the close of the last session of the general term and the decision was reserved until the present time for fuller consideration, which it has received at our hands.

The admissibility of the evidence depends upon the question whether the orphans' court of the District of Columbia possessed jurisdiction to pass the decree under consideration. If it had
90 the authority to decree the sale, under the circumstances, we think the several items of testimony offered, disclosing different steps in the course of its proceedings, were admissible, notwithstanding the grave omissions and inaccuracies they disclose, upon the authority of Grignon *v.* Astor (2 Howard, 319).

The question of jurisdiction is therefor of controlling importance in the case.

It is insisted by the defendant that the authority was conferred by the terms of section 10, sub-chapter 12, of thet estamentary law of Maryland, 1798, chapter 101, which is in force within the District of Columbia.

It will be proper to consider first the state of the law in Maryland with respect to the powers of guardians and of the orphans' court over the real estate of infants before the passage of that act.

It cannot be contended that any power to sell the lands of the ward belonged to the guardian *virtute officii* without the special authorization of a competent court. Any such attempt would have been justly punishable as an abuse of his office, and for any unauthorized diminution of his ward's realty he would be chargeable in exemplary damages.

The early legislation of Maryland constantly recognized this want of authority in the guardian to sell or diminish the real estate of the ward. At an early day it was provided that there should annually be called by the county court "an orphans' jury" to inquire "if any waste hath been made of orphans' lands" (1715, chapter 39, section 33). It is further provided that the ward on attaining majority should be entitled to enter into all lands which had come into the guardian's possession in right of the ward under penalty of treble damages for failure to yield possession (1758, chapter 4).

The early statutes also required the maintenance of the ward from the income of his estate alone without any diminution of the principal.

By act of 1715, chapter 39, section 9, it was provided that if the interest of his estate should be so small that it would not extend to a free education and maintenance of the orphan he should be bound apprentice until twenty-one years, unless some kinsman or charitable person will maintain and educate him for the increase of his estate "without any diminution of the principal, which shall always be delivered to him at his full age."

By the act of 1777, chapter 9, the office of commissary general was abolished and orphans' courts were first established in
91 Maryland, but no authority to consume any part of the principal of the ward's estate was conferred until the passage of the act of 1785, chapter 80, section 9, which authorized the orphans' court to allow the guardian to apply a tenth part of the personal estate annually for his education.

In 1798 "the testamentary law," as it is called, was passed, which was designed as a compilation and amendment of the existing laws and regulations respecting wills, administrations, and guardianships.

The courts established by this act were to be composed of laymen. There was omitted even the provision of the act of 1777, which required that the judges should be selected from among the justices of the peace; the only qualification was that they should be "men of integrity and judgment." The new tribunals were to be, as they were sometimes called, the people's courts, and the cases where an educated lawyer ever occupied one of these offices since the passage of that law may probably be reckoned on the fingers of one hand. Dr. Causin, the orphans' court judge who passed the decree under examination, was at the time a practicing physician, but was doubtless as learned in the law as any who had ever held the position in

this District up to the absorption of the court in the present judicial system of the District in 1863.

Naturally the Legislature appreciated the necessity of restraining the authority of courts thus constituted with a jurisdiction so obviously special and limited within well-defined bounds. In the words of the court of appeals of Maryland, in Scott *v.* Burch (6 H. & J., 71), "To avoid the recurrence to incidental or implied authority the powers of the orphans' court, both in relation to the subject-matter of its jurisdiction and the forms of its proceeding, are declared with the most formal and precise minuteness."

But with the plain design of enforcing this purpose so as to avoid all risk of its violation there was added section 20 to sub-chapter 15, which declares that "the said orphans' court shall not, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever not expressly given by this act or some other law." With the same purpose it was declared by section 16, of sub-chapter 12, that "nothing in this act contained shall be construed to affect the general superintending power exercised by the court of chancery with respect to trusts."

The controlling authority of these provisions has never been disputed, but it may be well to refer to a few of the multitude of instances in Maryland in which they have been enforced by the appellate courts.

92 Thus, in 6 H. & J., above mentioned, in denying the authority of the orphans' court to revoke one of its previous orders, the court says: "Upon an examination of its provisions (the act of 1798) no such power can be found, and the exercise of such a power of revocation can only be countenanced by the doctrine of constructive authority, but recourse to such a principle is emphatically condemned by the express enactment of the statute."

So in Spencer *v.* Ragan (9 Gill., 482) the authority of the orphans' court to require executors to strike from the inventory property belonging to a petitioner was denied because the statute had only expressly authorized this to be done upon the application of the executor or administrator.

In the same volume, p. 91, Townshend *v.* Brooke, upon the ground that "they are tribunals confessedly special and limited in their jurisdiction without any constructive or incidental power," the court of appeals denied the power of the orphans' court to order an administrator *ad colligendum* to pay counsel fees to the attorneys of the executors for resisting a caveat.

In Lowe *v.* Lowe (6 Maryland, 352) it was held on the same ground that section 7 of sub-chapter 10, authorizing the orphans' court to order an executor to pay over a part of a distributive share or money legacy before final account, where the applicant is needy and the personal estate plainly sufficient to pay the debts, does not embrace the case of a specific legatee, because the section speaks only of "a legacy or bequest in money."

In Taylor *v.* Bruscup (27 Maryland, 225) an administrator applied to the orphans' court for an order requiring the sister of the intestate to produce his bank book. The statute authorizes an adminis-

trator, who believes that any person has concealed any portion of a decedent's estate, to make such an application.

The court of appeals held that as concealment was the ground of the jurisdiction it should be averred and established by the evidence, and that proof of mere withholding of property did not present the case contemplated, and hence that the orphans' court erred in passing such an order. The opinion quotes as applicable the language of Lord Coke, from 2 Inst., 543: "These particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly restrained, and cannot be extended further than the express letter of their privileges will most explicitly warrant."

See 4 Maryland Chancery, 452, Conner *v.* Ogle.
44 Maryland, 112, Norment *v.* Brydon.

93 In Brodess *v.* Thompson (2 H. & G., 125) the plaintiff sued to recover the cost of buildings erected on the ward's land during his minority. The orphans' court had expressly ordered their construction and prescribed their size and materials, and the excellence of the work and reasonableness of the charge having been certified by sworn viewers the guardian's account containing this charge was approved by the court, though in excess of the income of the estate.

The appellate court held that the power to exceed the income of the ward's estate was to be exercised only for his maintenance and education, and that the orphans' court had no authority to sanction the application of any part of the principal to the erection of new buildings.

Similar rulings have been made in this jurisdiction. Thus in Mauro *v.* Ritchie (3 Cranch C. C., 154) the court, after declaring that the orphans' court has no power to remove a guardian for any cause not pointed out in the statute, continued: "If it claim jurisdiction to remove a guardian for any other cause, it must claim it as a jurisdiction incidental to the power of appointment. But all incidental jurisdiction is expressly forbidden by the statute." The Supreme Court, in Yeaton *v.* Lynn (5 Peters, 230), questions the propriety of an act of the orphans' court in revoking the letters of an administrator upon his failure to give counter security, because the power was not expressly conferred by the statute, and all exercise of implied powers is forbidden.

Many other cases might be cited to the same effect, evincing as uniform a concensus of opinion upon this point as upon any other in the law.

We have no alternative but to respect this unbroken current of decisions, and we therefore hold, as the unquestionable rule of construction, that the power to order the sale of an infant's lands cannot be held to have been committed to the orphans' court by the statutes unless it has been expressly given, and that no considerations of convenience to suitors or of supposed legislative intention, however strongly implied, will avail, if it has not been so expressed. That court could no more justly claim such authority in the absence of

an express grant than it could grant a divorce, or admit to probate a will not executed as required by law, or accept an administration bond without security because such was the wish of the deceased, or grant administration when the deceased was domiciled, or *bona notabilia*, sought to be administered, were outside the boundary of the District, however near the dividing line. The unanswerable response to such applications would be: "The said orphans'
94 court shall not, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever not expressly given by this act or some other law."

It is in the light of these principles that we are to examine the provisions of the act of 1798, chapter 101. The statute is a very long one, containing five sections, the third of which for convenience is subdivided into fifteen sub-chapters. The provisions referring especially to "guardians and orphans" are contained in subchapter 12, and the 10th section, under which the power to pass such a decree by the orphans' court is claimed, reads as follows:

"And once in each year, or oftener if required, a guardian shall settle an account of his trust with the orphans' court, and the said court shall ascertain at discretion the amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects, and destination of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate and to make use of his principal and to sell part of the same under its order: Provided, nevertheless, that no part of the real estate shall, on account of such maintenance and education, be diminished without the approbation of the court of chancery or general court, as well as of the orphans' court."

That part of the section which declares that "the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate and to make use of his principal and to sell part of the same under its order" cannot be invoked as affording anything like an express power to decree a sale of an infant's lands. The provision plainly, by its terms, its context, and the history of its origin and expansion, refers only to the personalty of the ward, and such has been its uniform construction by the courts of Maryland. Thus in Brodess *v.* Thompson (2 H. & G., 126) the court says: "The interest or income of a minor's estate is the fund out of which he is to be maintained and educated, and under no circumstances could be exceeded until the act of 1785, chapter 80, was passed. By the ninth section of that law the orphans' courts are invested with authority to allow the guardian to apply a part of the personal estate, not exceeding a tenth part thereof, to the education of his ward. The act of 1798, chapter 101, in its tenth section of the 12th sub-chapter, only enlarged this authority by extending the expenditure to any parts or the whole of the personal estate if necessary."

The 12th section of the same sub-chapter is introduced to prescribe the mode in which the guardian should carry into
95 effect the power of sale "when the personal property of a

ward consists of specifics." The court must pass an order for such sale, specifying whether it is to be made for cash or on credit, and requiring the purchaser to give security, &c., and all the provisions in the statute relative to sales by executors are expressly made applicable to such sales of personalty by guardians.

It thus appears that where the statute designed to allow a diminution of the personal estate of the ward it not only expressly conferred the jurisdiction upon the court to allow such diminution, but in express terms it authorized the orphans' court to allow the personalty to be sold for the purpose.

We would not expect to find in the statute a less explicit grant of authority to sell and diminish the real estate of a minor if such a jurisdiction was intended to be conferred upon the orphans' court. Indeed, one would naturally look for greater explicitness in a grant of such an authority when we recall the astonishing importance attached to the possession of land at that day and the exacting formalities then attending its transfer or encumbrance.

But the only expression in the law which is relied upon as creating such an authority in that court is comprehended in these words in the 10th section: "Provided, nevertheless, that no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the court of chancery or general court as well as of the orphans' court."

The remaining sections of the sub-chapter which have reference to the ward's lands are framed with a cautious view to the strict accountability of the guardian, and differ but little from the previous stringent laws on the subject. The guardian is to have the realty reported on by viewers appointed by the court. He is strictly forbidden to commit waste on the land, but the court, on application, may authorize him to cut down and sell wood for the ward's maintenance and education, and stringent rules for the leasing or cultivation of the lands in one of the several modes specified in the law are explicitly laid down for the guidance of the court and guardian.

And yet there is not a word throughout this comprehensive statute, the provisions of which frequently descend to details, well-nigh trivial in their minuteness, that gives the slightest direction or hint as to the mode in which the realty is to be sold, the machinery by which it is to be effected, or the terms upon which the infant is to be deprived of what at that day was an important qualification—to vote—and the indispensable qualification to hold high public office.

The Legislature that so cautiously guarded against the un-
96 authorized diminution of the timber on the land or its careless cultivation could scarcely have designed that the houses and lands together might be struck off with fewer accompanying safeguards than surrounded the order to cut fire-wood on a corner of the farm.

Again, to have conferred such a jurisdiction upon the orphans' court would have been altogether unnecessary. There existed at the time, as there had done in Maryland from the earliest period, a

tribunal of general jurisdiction fully authorized to decree the sale of the real estate of minors.

In Dorsey *v.* Gilbert (11 G. & J., 90) the court says:

"It was an undoubted power of the court of chancery, before any of our legislative acts authorizing the sale of infants' estate, to convert the real estate of an infant into money, and many cases may be found where the guardians of infants, under particular circumstances, have been authorized to make this conversion. The court of chancery, in the exercise of this jurisdiction, acted under a delegated authority from the king, who, as *parens patriæ*, had jurisdiction over the persons and estates of infants. The legislation of this State in relation to the sale of infants' estates is but a modification and enlargement of an acknowledged power. The property of the infant is not in any manner impaired or lessened, but a change in its character alone is effected, and that for his benefit."

And this principle, admitted throughout the decisions of the courts of that State, is reaffirmed in one of the last volumes of its reports, Long *v.* Long (62 Maryland, p. 80), in these identical terms.

Hence, in 1798, the guardian had the clear right to institute appropriate proceedings in a chancery court for the sale of his ward's real estate, and out of the proceeds, when realized, the court had full authority to allow the expenditure of part of the fund for his maintenance and education. But as the exercise of this authority of diminishing the fund in the chancery court might conflict with the pending administration of the ward's estate, thereafter to be more fully vested in the orphans' courts, the wise provision for insuring fidelity of accounting and preventing waste was introduced into section 10, which, as we understand it, was designed to forbid the diminution of the proceeds of the land after it had been sold in chancery, or possibly by a guardian under a will, without the approbation as well of the chancellor who might have decreed the sale as of the orphans' court, which already had the guardian's accounts before it and could better judge whether a necessity existed for diminishing the proceeds of the realty. The new restriction therefore might rather be considered as a limitation upon the pre-
97 existing power of the chancery court, which was no longer to be at liberty of its own discretion alone to diminish the realty of the ward; and the purpose of the proviso would have been more plainly disclosed by changing the frame of the sentence so as to read that the chancery court should not thereafter diminish the real estate of the ward without the approbation of the orphans' court.

That the words relied on fall far short of an express grant of jurisdiction to order a sale of the real estate of a minor seems self-evident. That there is even an absence of any necessary implication of such an authority seems also plain, and its possession by the orphans' court can only be sustained by the most liberal invocation of that "incidental power or constructive authority" which is so positively forbidden by this statute.

It is a circumstance entitled to great consideration that during all the interval since the passage of the act of 1798 no reported case can be found in Maryland where the orphans' court has assumed to ex-

precise such a power of sale. The only instance that has ever been relied on to the contrary is that known as Goltier's case, reported in a note to Williams' case in 3 Bland, 200; but examination will show that the relief sought there was not that referred to in section 10 of sub-chapter 12. It was not an application to diminish the realty at all, nor was it sought to sell the real estate of infants "for their maintenance and education," which is the only ground of whatever jurisdiction is recognized in that section. The guardian there did not ask that any part of the principal should be so applied, but he stated that the owners of eight undivided ninths had contracted to sell a mill and adjoining lands, provided the petitioner should be able to convey the remaining one-ninth interest of his children therein for a price which he deemed advantageous, and he asked that he might be ordered to convey his children's interest to the purchaser. It was a prayer in effect for such a decree as the chancellor was authorized to make under section 12 of the act of 1785, chapter 72. The orphans' court declared its opinion that the sale was for the advantage of the children and should be confirmed, and authorized the petitioner to execute the deed. The case was then laid before the chancellor, who did not profess to act under section 10 of sub-chapter 12, but under section 7 of that sub-chapter (the report of the case in that particular in Bland being incorrect, as appears from an authenticated copy of the proceedings which I have placed among the papers in this case). The precise text of the order is in these words: "Under power vested in this court
98 by the act of 1798, ch. 101, sub-chapter 12, section 7, the above order of the orphans' court is approved."

This order seems as indefensible under the one section as the other, for the case is certainly an extraordinary one, even when it is viewed, as it should be, as a mere application to ratify a sale already contracted to be made, to change an investment while preserving the *corpus* undiminished.

The most careful search among the records and painstaking inquiry of the most learned and experienced of the distinguished judges and lawyers of Maryland has resulted in the conviction that no case has been heard of where such a proceeding as the present was ever undertaken in that State. That orphans' courts possessed no power to order a sale of lands and had no jurisdiction over real estate was there regarded as an axiom until the passage of the act of 1865, chapter 162, section 3, which for the first time entrusted to them concurrent jurisdiction with chancery to order the sale of the real estate of intestates, of limited value, upon appropriate proceedings specified in the act. Previously the uniform language of the courts had been to the effect that "controversies with regard to real estate must be settled in another forum," and that the several acts of Assembly from which the orphans' courts derive their powers restrict the action of those courts in cases of intestacy entirely to personal assets. None of them confer any jurisdiction over the realty. (9 Gill., 82, Hayden *v.* Burch.)

Upon this ground, and because the exercise of a power of sale of realty by an executor under express directions in a will was outside

of the duties which were intended to be regulated by the act of 1798, it was uniformly held by the courts that the money coming into the hands of the executor from such a sale of realty was not covered by the testamentary bond until it was expressly provided otherwise by the act of 1831, chapter 315. That the ordinary guardian's bond would not be answerable for the proceeds of land coming into the guardian's hand would appear to be equally clear and would seem to have been conceded in the present case by the requisition of the orphans' court of a different and additional bond by Mrs. Thaw before she should make the sale, in which she is described as trustee under the decree and is bound to the discharge of her duties in that capacity.

Although the entire proceedings, from the petition onward, assume and rely upon the orphans' court as the source of authority to Mrs. Thaw to dispose of the land, it has yet been ingeniously argued
99 that conceding there may have been some want of explicitness in the grant of power to the orphans' court to sell the real estate, still the present proceeding may be regarded as having received its effective strength from the act of the circuit court; that the power to sell was therefore communicated by the order of a court possessed of ample jurisdiction to order a sale of an infant's realty; that the force of such decree could not be impaired by its approval by the orphans' courts, and that it is quite unimportant whether the approbation of the orphans' court preceded or followed the action of the circuit court.

But if we were dealing with a proceeding which derived its original strength from the action of the circuit court as a court of chancery its decree, in the absence of some statutory dispensation, could be valid only where there had been an observance in the progress of the controversy of those prerequisite conditions which are indispensable to the proper administration of justice. (Windsor *v.* McVeigh, 93 U. S., 277.)

Of these prerequisites the most fundamental and familiar is that no one should be condemned without a hearing, and this impregnable axiom should especially be maintained where a court of equity is passing upon the rights of infants—the most helpless class of its suitors.

The case of Hunter *v.* Hatton (4 Gill, 124) shows that a decree had been passed by a court of general equity jurisdiction to sell the real estate of a minor upon the petition of her guardian and next friend alleging that a sale would be for her interest and advantage. The infant was not made a party to the suit. The act of 1816, chapter 154, prescribed the form of the proceeding where the court was asked to decree on such an application. It contemplated that the infant should be made a party, and that testimony should be taken in the usual mode. By the act of 1818 the court was directed, as a more satisfactory mode of proof, to issue a commission to freeholders to report whether the sale would be for the interest of the infant, and as this last act made no mention of summoning the infants it had been assumed in the case cited that it was no longer necessary.

But the court of appeals held that as the later act contained no express repeal of the requirement as to the summons under the previous law the decree to which she was not a party was invalid and was not admissible in evidence against her in a suit brought to recover the land by her after she had attained age. The court says, "The objection to the evidence offered on the ground that the infant was not summoned and made a party to the proceedings before the court for the sale of her land is not an objection to the jurisdiction of the court over the subject-matter of the petition, but rests upon the broad principle, both of law and equity, that, unless in cases where it is otherwise provided by legislative enactments, decrees and judgments of courts of law and equity are only binding on the parties to the proceedings on which they are founded and those claiming under them;" and, after pointing out the necessity of the appointment of a guardian *ad litem* for the infant and the duties which would have devolved upon him in the course of the controversy, the court continues: "To deprive them" (the infants) "of these privileges would be entirely inconsistent with the whole policy of our legislation, which has ever evinced an anxious desire to throw around the rights of infants to their real estates every necessary and salutary safeguard."

Again, by the act of 1785, chapter 82, the court of chancery was authorized to decree the sale of the real estate of a decedent for the payment of his debts where the personalty was insufficient.

In 1826 the old circuit court of this District passed such a decree upon a creditor's bill brought against the administrator and the infant heirs. The land was sold, the sale ratified, and the purchaser received a deed and was in possession in 1834 when the Supreme Court, on a bill of review brought in behalf of the heirs, declared the whole proceedings in the original suit invalid and annulled the decree and sale. The case (Bank U. S. *v.* Ritchie, 8 Peters, 140) was decided upon grounds which the losing party doubtless considered extremely technical. In the opinion Chief Justice Marshall first called attention to the fact that although the court had appointed a guardian *ad litem* to answer for the infants, yet the person so appointed did not appear from the record to be a relative of the infants, though their parents were living. "He was appointed," says the court, "on the motion of the counsel of the plaintiff without bringing the minors into court or issuing a commission for the purpose of making an appointment. This is contrary to the most approved usages and is certainly a mark of inexcusable inattention." "The infant's answer, though signed by the guardian, was not sworn to, and, although the insufficiency of the personal estate is admitted by the administrator, it was not otherwise established by the proof, nor were the claims of the creditor established except by the admission of the guardian." The court declared these omissions to be fatal defects in the proceedings and says: "Independent of these special requisitions of the acts it would be obviously the duty of the court, particularly in the case of infants, to be satisfied on these points."

And in 1844 the Supreme Court, in Shriver *v.* Lynn (2 Howard, 60), in setting aside a trustee's sale ratified by the chancery court

of Maryland in 1813 because the land sold had not been
101 embraced in the decree to sell certain other enumerated lands of the same owner, uses this apt language: "No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law. It must obtain jurisdiction of the thing in a legal mode. A decree without notice would be treated as a nullity, and so must a sale be treated which has been made without an order or decree of the court, though it may have ratified the sale." "The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding."

Courts of justice are not at liberty to content themselves with the bare recognition of these principles and their mere repetition as amiable, legal platitudes; but they have no alternative but to apply them effectively where the facts justify their application.

Examining the proceeding before us as though it had originated or were principally conducted and had received its effective strength from the circuit court decree, we are to inquire whether there appears in the statute any dispensation of the usual and essential requirement to a valid decree in chancery cases. The answer must be in the negative, for there is not the slightest hint of any intention to interfere with the chancery procedure as it should have been maintained in common justice and reason and as it did in fact exist before the act of 1798.

And viewing this as a chancery proceeding, to be conducted according to recognized chancery methods, it is obvious there was a total disregard throughout of all those safeguards which in the cases cited were declared to be of such vital importance that their omission invalidated the decrees passed in their absence.

This petition was filed by Eliza V. Thaw, who, though spoken of in it as executrix, is not named therein as guardian. We have seen from the cases cited (4 Gill and 8 Peters) that if she had filed it as guardian and next friend it would still have been necessary that the infants should be made parties and summoned and should answer under the oath of their guardian *ad litem*, and that the case should be fully proved against them on an examination where they could be represented; but in the case before us there was no attempt to comply with either of these indispensable requirements. No notice whatever was given to the infants or to any friend in their behalf from the beginning to the end of the proceeding; neither of them appeared in person or otherwise, and there is nothing in the
102 case to show that the plaintiff was ever apprised of the proceedings until after he attained his majority.

The only intimation of anything like evidence having been adduced in the case is the statement, in the copy of the decree of the orphans' court produced from the circuit court, that "on the petition, exhibits, accompanying proofs, and representations of the said Eliza V. Thaw, in her capacity as guardian and executrix," the sale was ordered. If any "proofs" did accompany the petition, beyond the exhibits and "the representations of the petitioner," there is

nothing to show that they were ever filed in the orphans' court or transmitted to the circuit court, for nothing whatever was sent to the latter except the copy of the petition and decree, and this copy is the sole evidence of their contents, and even that such a petition was filed or such a decree passed. That a chancery court could have regarded such a presentation of an application to sell an infant's land as sufficient in essentials of form or as supported by proper proofs to justify a decree is inconceivable.

Again, the only possible ground upon which the sale could have been claimed under section 10 was that the income of the infant's estate was insufficient for his maintenance and education, and hence that it was necessary for those purposes that the principal should be sold and diminished. But the petition was not framed upon that theory and presented no such state of case; not a word appears there, nor anywhere among the records of that court, to show what the orphans' estate or income amounted to, or whether it was insufficient for the purposes indicated. Mrs. Thaw was tenant for life of the entire estate, the income of which she was authorized to apply for the maintenance of herself and the two children. Four years after the death of her husband she filed this petition, alleging that "the property of the deceased is insufficient to support her and the children provided for in the will," and praying that "the court will deem it expedient and cause the said lots to be sold for the purpose of relieving the immediate wants of the petitioner and for the support and education of the children." The decree passed on the same day by the orphans' court declared that "the guardian for her minor children and herself is authorized and empowered to sell," &c. These proceedings do not bring the case within the design of the provisions of section 10. The principal object of the application was the support of the petitioner and to relieve her immediate wants; the needs of the children are certainly not the main purpose of the application, but they appear to be mentioned incidentally rather than relied on as its object. Indeed, the sale
103 of the interest in remainder of the children (in view of the age of the widow, who lived twenty-two years afterwards) could have contributed but to an insignificant extent towards their then maintenance or education. What the lands brought at the sale nowhere satisfactorily appears, and in the deed from Mrs. Thaw to Favier (dated March, 1848, and first placed upon the records in March, 1867) the consideration is stated as "the sum of —— lawful money," &c. Nor is there a particle of proof throughout the case that the infants ever received any benefit in any form from what may have been realized by the sale.

The proceeding throughout appears simply as an application by a tenant for life to realize in money the value of her life interest in lands and perhaps incidentally to place in some more profitable form of investment whatever might remain after the application of part of the proceeds to pay her own debts.

But the will on its face presented an insuperable difficulty that should have prevented a court of chancery from recognizing any authority in the orphans' court to interfere in the matter. The

property is expressly left to the widow to hold during her life "in trust for the equal benefit and maintenance of herself and of the two children," with remainders and upon conditions expressed with considerable pains, though with some confusion of language. With the administration of such a trust the act of 1798 expressly forbade the orphans' court to interfere. That an orphans' court should undertake to appoint a trustee was a novel proceeding. The chancery court remained the sole tribunal where jurisdiction over property so circumstanced was to be exercised, and that court should not have undertaken the administration of the trust upon a case so defectively presented and in absence of proof.

It seems clear to us, then, that if the process had been inverted and this application had been made to the circuit court in the first instance that court could not properly have granted the relief prayed in view of the manifold errors and imperfections of the proceeding; and since the orphans' court was without jurisdiction to decree *proprio vigore* we cannot believe that the united illegal acts of the two tribunals, each without competent authority, could together confer a lawful power of sale.

Nevertheless, the orphans' court did pass a decree and the circuit court did "affirm" that decree (according to the few words in the minutes), which authorized and empowered the life tenant assuming to act as trustee to sell the lands devised in remainder to the infant children "at public or private sale," "upon such notice by advertisement as she shall deem reasonable," for cash or on credit at her
104 option, and to execute to the purchaser "a valid deed of conveyance in fee simple of the premises, with all the right and estate therein of the said Columbia and Columbus Thaw, minor children aforesaid."

From this *ex parte* decree no appeal could have been taken. The only party to the proceeding, the life tenant, was content. She had selected the land she wished to sell; she desired prompt action from the court and she obtained it, for the decree seems to have followed instantly. The brief interval allowed by law for an appeal from an order of that court, in the nature of things, would long have passed before the minors would attain age or be competent to demand it; and if the decree was really "passed upon testimony of witnesses," then no appeal could be allowed unless the party should immediately notify his intention to appeal and require the testimony to be reduced to writing and sent to the appellate court within thirty days (sub-chapter 15, section 18). A case resembling this in some of its features is Holbrook *v.* Brooks, reported in 33 Conn., 349. Under the express authority of a statute the probate court ordered the sale by the guardian of an infant's land in which, as in the case before us, the guardian had an undivided interest. His return to the court, very promptly made, set forth the particulars of the sale, and this was recorded by order of the court. The guardian then resigned and turned over to his successor in office the purchase-money stated in the return, but passed no account of the ward's estate in the court. Suit was brought upon the guardian's bond after the ward had reached the age of twenty-eight, in which

it was claimed that the guardian's return had assigned to the ward less than the full value of her undivided interest in the land, and had reserved for his own interest more than he was entitled to. The defendant relied upon the conclusiveness of the action of the probate court in ordering the recording of the return, but the supreme court held that the order was merely ministerial and was not an adjudication of the correctness of the report, and that it could not be precluded from the pending inquiry by any action had by the probate court on that return. The opinion says: "A glance at the proceedings in this case will show the absurdity of the defendant's claim. The guardian made a return that he had sold the property—*bona fide* and for a fair price, if you please—for a certain sum, which return was recorded. Though required by law and entered of record, it was nevertheless but the naked declaration of the party in interest, not under oath and not subject to the usual tests of a cross-examination. The adverse party was not present and had no opportunity even to tell her own story, and the court in no way or manner found the declaration to be
105 true. To give such a proceeding the force of a judgment conclusively binding upon the parties would sanction a manifest fraud in the present case and open a wider door to fraud in the future."

Even if the orphans' court of the District of Columbia had been clothed by the statute with a special jurisdiction to decree such a sale, it would be essential that the jurisdictional facts should appear in the proceedings (6 Wheaton, 126); but the entire absence here of all proper action on the part of the guardian would render the proceedings obnoxious to the criticisms in the Connecticut case, for we find no entry on any record to show that the guardian ever passed any account with her wards or that either court ever ratified the sale or had any information that it had been made, except the few words in the handwriting of the then register of wills, which one of his successors found among other loose slips of paper in an old portfolio in the office and pasted on the brown paper leaves of a scrap book, such as is used to preserve newspaper clippings.

If the plaintiff were in possession and the defendant had brought an ejectment, is it possible she could recover upon this evidence? We are of the opinion that the entire proceedings from the filing of the petition were grossly imperfect, irregular, and unauthorized and are ineffectual to divest the title of the plaintiff to the lands described in the declaration.

It has been urged by the plaintiff's counsel that the proceedings were still further illegal because the interest of the minors in the lands sold were estates in remainder or reversion, and not in possession; but as we are of opinion the orphans' court was without authority to decree the sale of the real estate in any event, it is needless to consider this point, nor for the same reason can we hold that the act of Congress of 1843, March 3d, operated a repeal of a power of sale vested in the orphans' court by the act of 1798. As no such power was conferred by that act, there could be no repeal of what did not exist.

But the observations we have already made as to the needlessness of conferring the power to sell the realty of infants upon the orphans' courts in 1798, in view of the plenary power then existing for that purpose in the courts of chancery, apply with double force to the present proceeding, commenced after the passage of the act of Congress of 1843 entitled "An act to provide in certain cases for the sale of the real estate of infants within the District of Columbia."

The Legislature of Maryland, from time to time, had passed laws to regulate the exercise by the court of chancery of its admitted powers, with a view to the greater security of suitors, especially
106 where infants were parties jointly interested in real estate; but no such regulations had been adopted in that State respecting the sale of real estate belonging to infants alone up to 1798, nor was there such legislation in Maryland until the law of 1816, the best features of which were incorporated by Congress in the act of 1843. This excellent statute from that time became a legislative instruction for the chancellor as to what should be required as proper safeguards wherever an application should be brought before him for the sale of an infant's real estate. It exacts a petition by the guardian, duly verified, stating all the facts calculated to show whether the ward's interest will be promoted by a sale. It provides for all proper parties, for answers under oath by proper guardians *ad litem*, for answers, in addition, by such of the infants as are over fourteen, for commissions to be attended by the guardians *ad litem*, for taking the testimony of disinterested witnesses, and for a decree only after it has been proved to the satisfaction of the court that the interest of the infant manifestly requires the sale of his real estate, and that the rights of others will not be violated thereby. It protects the infant against the practices of the guardian by providing that he shall not become the owner of the land during the minority of the ward, and it prescribes the manner in which the proceeds shall be disposed of or invested, no diminution being allowable, of course, unless the orphans' court shall also give its approbation. If it were unnecessary, in 1798, to apply to the orphans' court for an authority already possessed by the court of chancery, and unreasonable to abandon its settled modes of procedure to improvise unguarded methods in an inferior court, *a multo fortiori* was it worse than unreasonable, after the act of 1843, for a guardian to turn his back upon the ample safeguards and facilities afforded by that statute for the conduct of such an application and resort to a procedure accompanied by as slight precautions for the rights of infants as could well consist with any disposition to guard their interest. It may have been deemed highly important by the tenant for life that she should, in as cheap and speedy a manner as possible, be enabled to sell her life estate in the lots, disembarrassed by the estate in remainder of the infants, but it was a manifest wrong to these children to expose their interest in the father's land to the certainty of sacrifice. Nobody could be in doubt as to which of the parties would be the loser by this mingling in one sale of these different rights.

The defendant insists upon defences which it is claimed are avail-

able, notwithstanding there may have been a want of juris-
107 diction in the orphans' court to pass the decree, and these remain to be considered.

The long interval since the sale and the act of ownership since that time by the purchaser and the subsequent grantees is first relied on. But the possession by Favier and those claiming under him, with the payment of taxes, &c., is not sufficient to defeat the plaintiff's claim if otherwise well founded. Columbus Thaw had no right of entry upon the property until after the death of his mother, the life tenant, in February, 1866, much less than twenty years before the impetration of the present action.

The supposed estoppel, invoked against the plaintiff by the recitals in his deed to Little in 1871, cannot in our opinion be maintained. Neither the defendant nor her grantors were party to the deed. Such a recital can no more be invoked by a stranger against the plaintiff than a recital to the contrary effect could be adduced by the plaintiff against the defendant. But the question is set at rest by the evidence set forth in the fourth bill of exceptions, which is before us free of objection. It shows, without contradiction, that the real estate referred to in the deed as having been disposed of by Mrs. Thaw and the proceeds invested in other real estate was not the property involved in this suit, but was none other than the homestead on New York avenue.

Nor can we agree that the will of Joseph Thaw conferred upon his wife the power to sell and dispose of his real estate at her own pleasure. Neither the case of Second Reformed Presbyterian Church *v.* Disbrow (52 Penn. St., 219), referred to by the defendant, nor the other cases examined by us where a similar ruling was had would support the contention in the present case. Here there is no devise of the property to the wife, out and out. It is expressly given to her "to hold and enjoy during her natural life," in trust for the equal maintenance of herself and her children; and it is only in the event of the death of both the children that it is "then" given to her and her heirs. The provision which devises and bequeaths to the children all the estate, real and personal, that shall remain at and after the death of their mother can be fully gratified by confining its application to the portion of the remaining personalty that had not perished or been consumed in its use; and this is more consistent with the rules for the construction of wills than to consider the language as repealing the reiterated declaration of the testator that his wife was only to enjoy a life estate.

Finally, we have been earnestly referred to the repeated decrees of the orphans' court, subsequently affirmed by the chancery
108 court, ten of them between 1823 and 1844 and many others after that date, in which the existence of the jurisdiction to pass such decrees had been assumed; and we have been urged to respect this long- continued practice, and not to risk the disturbance of titles by a contrary construction.

We have been duly impressed by this consideration, and it has had great influence in our examination of the question of jurisdiction. The bare fact of the exercise of jurisdiction by a court has a

certain weight, though no repetition of the claim to the authority can ever amount to proof that it is well founded. The judgment is still examinable by other tribunals, and if found to have been rendered without jurisdiction it will be treated as a mere nullity, as simply void, as a blank, as though it never had existed, for it is only the judgment of courts of competent jurisdiction that are held conclusive upon the parties or are entitled to respect as precedents. When the reviewing court has positively determined that the judgments in a certain direction are nullities for want of jurisdiction in the court that rendered them, it is unimportant what may be their number, for no accumulation of usurpations and errors can avail to establish jurisdiction in the entire series if it does not exist with respect to each individual case. Even if we felt obliged by this judgment to overrule decisions made upon solemn argument and after mature deliberation (as would be our duty if we were clearly convinced, after full examination, they were erroneous), we would be venturing upon no untrodden ground. When Chancellor Kent wrote, fifty years ago, he reckoned more than a thousand cases as overruled or doubted. The fourth edition of Greenleaf's Overruled Cases claimed to have added fifteen hundred cases to the great number contained in the first publication of the work, and the increase has been manifold since that time. The Supreme Court, in 12 Wallace, in overruling its previous decision in the legal-tender cases, said: "It is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made." From 1821, the opinion in Anderson *v.* Dunn (6 Wheaton, 104) was supposed to embody the correct law of that controversy, but in 1880 the same court, in Kilbourn *v.* Thompson, 103 U. S., 168, denied its authority. There is probably no court that has not at some time overruled itself. In Blimline *v.* Cohen (8th Maryland, 147) the court of appeals determined that the court of common pleas of Baltimore city possessed no jurisdiction in cases of replevin, although it had previously taken cognizance of appeals from that court in such actions without questioning its authority.

In Collender *v.* Ins. Co. (23 Pa. State, 474), the appellate
109 court overruled the decision in Ewing *v.* Furness (13 Pa. St., 531), which had been by the whole court (Gibson, chief justice), "on the authority," as that ruling was expressed, "of several decisions of this court directly in point." The opinion in the latter case concludes an interesting discussion of the doctrine of *stare decisis*, with these words of comment on the former decisions: "It is a plain error, and it is not our duty to set the stain that mischance has dropped upon the law." And in a very recent case the same court, in York's appeal, reversed its decision rendered in 1857 upon a most important point respecting the application of the statute of limitations. As we have received no authenticated version of the opinion in the State Reports, we cite, only as argumentative, the following extracts from this opinion refusing a rehearing of the case, which are published as correct: "It is far better when this court commits a blunder to correct it in a manly way than to imitate the ostrich by hiding our heads in the sand. That decision is

but twenty-eight years old, and, as before stated, is not a rule of property. We now overrule it, and with it the other cases which have followed it. We restore the law as it stood before it was decided, and reinstate the act of Assembly." Cent. Rep., 354, 659.

In none of the suits to which we have been referred is it claimed there was any decision or even discussion of this question of jurisdiction or even an appearance by attorney or in person to relieve them from an absolutely *ex parte* character, except in the cases of Little *v.* Ingersoll and Mansell's appeal.

In the former, Columbia Thaw, after she had arrived at age and married, filed a bill to set aside all these proceedings in the orphans' court and to recover her undivided interest in these lots. The defendants insisted upon the sufficiency of the orphans' court proceedings, and also relied upon a deed executed by Miss Thaw after her arrival of age releasing all her interest in the land to Favier. The evidence failed to sustain her contention, in reply, that she was a minor at the date of this deed. The justice below, in his opinion, affirmed his belief that the orphans' court had jurisdiction to render the decree, and in the decree he incorporates the "opinion" that the title to the lots is vested in the defendant, and therefore dismissed the bill with costs. The case went to the general term on appeal, and the decree below was modified by expunging so much of this ruling as affirmed the sufficiency of the defendant's title to the property. As far as this action went it was a direct and intentional refusal to affirm the validity of the title under the orphans' court proceeding, although the general term denied the right of the complainant to recover in the face of her deed of release executed after she attained full age.

110 Mansell's appeal was from an order of the orphans' court authorizing a guardian to borrow money upon the real estate of the ward and secure the loan by deed of trust. The case was then referred to the equity justice, who refused to ratify the order, and certified the case to the general term. That court's opinion, as expressed by Justice Olin, asserts that "the power to order the sale of an infant's estate given to the orphans' court, subject to the approval of a court of equity, includes the power to mortgage, which is a conditional sale," and that since it is "agreed on all hands a court of equity may authorize a sale or mortgage the assent by the orphans' court cannot invalidate the act of the chancellor," and the decree approved of the order of the orphans' court; but it is apparent that the general term based its ruling upon the assumption of the jurisdiction which is the subject of the present inquiry. Whether the result deduced from that assumption was correct or not, or whether the act of the orphans' court may be justified upon other grounds than those stated, it equally remains that the jurisdiction was tacitly assumed and was not decided after careful argument and deliberation, and that there was practically no discussion whatever of the question now before us. In declaring as we do our conviction that this assumption was not well founded, we are therefore not called upon to dissent from a solemn adjudication after a deliberate examination by a court of last resort.

All of the other cases referred to seem to have passed *sub silentio*, and were decreed *ex parte* as a matter of course, apparently without a word of controversy. They are therefore merely reiterated instances of a faulty practice by a court of limited jurisdiction, and the frequency of the usurpation only magnifies the wrong.

We see nothing in this repetition of errors that establishes any rule of property which will be disturbed to the public detriment by a return to a proper practice. This court has not hesitated to correct such errors in its own procedure when brought to its notice, however long continued. A practice has existed here for many years to refer an equity cause to the auditor instead of to an examiner to take testimony. In the case of The Phœnix Ins. Co. *v.* Grant this course was adopted in accordance with well-established usage, and the proof taken under this reference, with the accounts, was before the general term in 3 McArthur, 48, upon exceptions. Objection was there made for the first time that it was improper to refer a cause to an auditor to establish in the first instance a fact put in issue by the pleadings, but that the testimony at that stage of the proceedings should first be taken in the usual way before an examiner.
111 It was not controverted that the reference accorded with oft-repeated precedent, but the court, when the objection was thus called to their attention, did not hesitate to condemn the practice, reverse the decree, and turn back the litigation to the point where this error was committed.

How this method of making sale of an infant's real estate began in this District does not appear. It commenced about the time of the faulty decree in Bank *v.* Ritchie. It may be that the judge or register of wills, or both, at the time may, before their appointment, have been citizens of States where such powers were by statute expressly conferred upon the courts of probate. Assuming the existence of the jurisdiction, the language of the act of 1798 would have been a sufficient invitation to its exercise, and that which had its origin in inadvertence was probably perpetuated through inattention, on the application of parties who wished to avail themselves of what they supposed to be a more speedy and economical mode of attaining their purpose.

It is not to be expected that the registers of wills, whose powers under the old system of judges were very great, would be disposed to discourage a practice which threw into their hands profitable fees that, under another system, would have been received by the clerk of the chancery court, and their interests were thus directly involved in its continuance.

In this class of cases there is always very earnest insistence, by the party who fears to lose his case, upon the great injury which a departure from alleged precedents may inflict upon innocent purchasers other than himself. The courts will always be willing to protect this class of suitors, but their interests should not be preferred to those of innocent heirs. The purchasers are volunteers who invest with expectation of gain; adults who are able to inform themselves of the condition of the title which their interests stimulate them to acquire, and who have the power to indemnify them-

selves from loss by discounting the risk from the purchase-money, or by guaranties and warranty of title. They are under no obligation to purchase, and are not presumed to do so until they have been satisfied as to the title they wish to acquire. They know that men not unfrequently have bought lawsuits, and they are not too innocent to have heard the legal maxim, *caveat emptor*. But the infant, whose property is to be sold, has none of these personal powers of protection. No little ceremony is observed in bringing the minor before the orphans' court that its guardian may be formally appointed; but, this formality complied with, the child, in a
112 case conducted as this was, would no more know that it was about to be deprived of its inheritance without due process of law than if it were at its play in another hemisphere.

People in these days seldom break into the possessions of others with a strong hand and hold them as by right of conquest. The claim is always under some color of title; and although the party in possession may defend under a judgment of a court possessed of ample jurisdiction to decree in a cause properly before it, his defence will be disallowed if there has been a want of such jurisdiction in the court to decree, however innocently he may have purchased property the rightful title in which had not been lawfully diverted from the proper owners.

Hickey *v.* Stewart, 3 Howard, 760, 93 U. S., 277; Windsor *v.* McVeigh, 26 Maryland, 23; Earle *v.* Turton.

That the legality of such reckless methods of dealing with the real estate of minors was never questioned during all this time, as is asserted, we find it difficult to realize. In this case, which is the only one with the facts of which we have been made acquainted, there certainly is nothing to show any acquiescence in the decree of the orphans' court on the part of the plaintiff. Favier, the purchaser from Mrs. Thaw, evidently entertained but slight confidence in the title he had thus acquired, for he hastened to obtain from Columbia Thaw a deed of release of her share as soon as she attained age, which he took care to have recorded many years before her mother's (trustee's) deed to him was placed on record. The brother and sister, during the year the mother died, brought a joint action of ejectment for the lands which, was afterwards dismissed, as the plaintiff testifies, by the attorney in the case without his consent or knowledge. Columbia Thaw afterwards instituted the equity suit, as we have seen, and the plaintiff's prosecution of this action completes the proof that in this case, at least, the jurisdiction of the orphans' court has been persistently disputed.

Many of the numerous cases where courts of great distinction have overruled faulty decisions of long standing involved principles and values infinitely in excess of any amount that may depend upon the present ruling, but those courts, nevertheless, declared, as we must, that apprehensions of troublesome consequences from a conscientious judgment cannot avail to induce a court to decide against its clear convictions. We suppose the effect of this decision will be much less extensive than the counsel for the defendant have per-

suaded themselves may follow the loss of their case, for the
113 lapse of time and honest settlements with wards must have left few cases open to controversy; but however this may be, we adopt the reply of Chief Justice Dallas in Smith *v.* Doe (2 Brod. & Bing., 581), where a similar consideration was urged: "If principle and practice are at variance practice must give way; and in this case, as in others, if the mischief is extensive the proper remedy, if such there be, must be sought for and applied elsewhere."

The question we have been considering relates not only to the propriety of this practice in the past. It involves the proper methods of procedure to-day and in the future in this class of cases.

If a guardian in 1844 had the right to institute such a proceeding and obtain such a decree the guardian of to-day has the same right to its fullest extent, and the court has no discretion to decline to entertain his application, for no legislation has intervened to impair whatever rights existed in 1844.

We believe no such authority existed then, and that none such exists now; and we shall therefore reverse the judgment below, and it is so ordered.

114 In the Supreme Court of the District of Columbia.

COLUMBUS THAW
vs.
MARIA RITCHIE. } At Law. No. 24092.

Opinion of Justice Cox.

The question of paramount importance in the case is how far the orphans' court is empowered by the act of Assembly of Maryland of 1798, ch. 101, sub-ch. 12, sec. 10, to order a sale by a guardian of his ward's real estate on account of his maintenance and education.

This statute was continued in force as the law of this District by the act of Congress entitled "An act concerning the District of Columbia, approved February 27, 1801."

It will assist us in the interpretation of the act to consider the state of the law of Maryland on this subject at the date of its passage.

There were at that time several acts in force under which proceedings could be instituted affecting the title of infants to their real estate.

By the act of Assembly of 1785, ch. 72, sec. 12, the chancellor was empowered to direct a sale of lands in which an infant had a joint interest or interest in common with any other person or persons on its appearing that it would be for the advantage of the infant as well as of the others, he taking care that the infant's share in the proceeds be paid over to him.

But the object of this act was simply partition. It was as much in the interest of the adult co-owner as of the minor and enabled the former to sell his property, which he could not do without the aid of the law, on account of the disability of his cotenant; but it

contained no provision as to the management and application of the minor's share and did not apply at all to property held by him in severalty. Indeed, on the next day after this act was passed the act known as chapter 80 of the same session was passed, which did undertake to direct the application of the minor's estate and which limited the consumption of the principal to the personal estate.

So, under the act of descents of 1876, ch. 45, if descended lands could not be partitioned between the heirs they might be sold by commissioners under an order of the county court if the land all lay in the same county, from which order an appeal might be taken to the chancellor; and if the lands lay in different counties the chancellor might directly decree the sale. In this case the sale was ordered without reference to the interests of any infant heir, but because of the impossibility of partition.

115 In virtue of its inherent jurisdiction over the subject of partition the court of chancery has exercised original concurrent jurisdiction with the county court in the cases provided for by this statute.

There were other acts providing for the sale or conveyance of property in which infants were interested for the benefit of creditors of the ancestor or in pursuance of contracts made by him.

But the above-mentioned statutes constitute all the legislation of Maryland before the act of 1798 which authorized the sale of infants' property in the interests of the parties entitled.

It will be seen that it is limited to cases of ownership by the infant jointly or in common with others, and that it does not contemplate any disposition of the minor's estate beyond its conversion into money. Certainly, no authority could be claimed, under the acts referred to, to apply the principal of the estate to maintenance or education.

The court of appeals of Maryland, in several cases of comparatively recent date, have expressed the opinion that the court of chancery had an inherent power to decree the sale of an infant's real estate, independently of statutes authorizing it.

The first case in which this occurred was that of Dorsey *v.* Gilbert, 11 G. & J., 87, decided in 1839. A private act had been passed authorizing the chancellor to decree the sale of an infant's realty. The chancellor held the law to be unconstitutional. The court of appeals reversed his decision and sustained the law. In the course of the opinion they say: "It was an undoubted power of the court of chancery, before any of our legislative acts authorizing the sale of infants' estates, to convert the real estate of an infant into money; and many cases may be found where the guardians of infants, under particular circumstances, have been authorized to make this conversion. 2 Story's Equity, 585, 586, 587. The court of chancery, in the exercise of this jurisdiction, acted under a delegated authority from the king, who, as *parens patriæ*, had jurisdiction over the persons and estates of infants."

The court of appeals did not assume to act under this extraordinary power in the particular case, because there was a special statute to authorize the sale, and its decision was simply to uphold that

statute as valid. The proposition above announced was not necessary to the decision of the case and may be considered a *dictum* merely; yet it was followed by similar *dicta* in Downer *v.* Sprecher, 35 Maryland; Long *v.* Long, 62 Maryland; and a still more recent case of Taylor *v.* The Peabody Heights Co., reported in the Central Reporter, vol. 3, No. 18, p. 867.

These expressions of opinion are not authoritative for us, and, in passing, I take occasion to say that, in my judgment, they are clearly erroneous.

116 The power seems to be asserted for the chancellor on the ground that it had been exercised by the court of chancery of England, and the only authority cited for this is Story's Equity Jurisprudence.

The court were evidently misled by the general language of Story asserting that a guardian will sometimes be allowed to convert personalty into realty and realty into personalty. Upon an examination of the cases referred to by Story, it will be found that they are principally cases in which the money of a ward was laid out in the purchase of land. In some of them it appeared that timber had been sold and the proceeds invested for the ward or applied to incumbrances. And these last are the only illustrations given of the conversion of realty into personalty. The guardian has also been allowed to lease his ward's land. But not a case is cited in which the chancellor decreed a sale of the infant's freehold estate. On the contrary, Lord Hardwick said, in Taylor *v.* Phillips, 2 Vesey, Sr., p. 23: "There is no instance of this court's binding the inheritance of an infant by any discretionary act of the court. As to personal things it may be done, but never as to the inheritance, for that would be taking on the court a legislative authority doing that which is properly the subject of a private bill."

It would seem, then, that the only ground for the proposition of the court of appeals fails. But it is not so important what may have been thought by that learned court at the late dates of the cases referred to. The important question is, what was understood to be the law at the time when the act of 1798 was passed, because we are to read that statute in the light of existing law.

At that time no court in Maryland had asserted this power of sale, and there is no reported case either before or after that date in which either the chancellor or any county court, sitting as a court of equity, has ever decreed the sale of an infant's freehold in virtue of this extraordinary power of the *parens patriæ* or in other cases than those provided for by statute.

On the contrary, as late as 1828, Chancellor Bland, in the Williams Case, 3 Bland, 186, reviewed this whole subject and examined all the English authorities at length, and said:

"Nor have I been able to find any case in the English books in which the court has undertaken to change the nature of an infant's inheritance by selling the land itself and investing the proceeds for his benefit, or in which the court has sanctioned any such sale made by the guardian or trustee of an infant." And again, after referring to sales made for partition or for payment of mortgage debts, he

says: "And therefore it is that the English court of chancery has never, except in the cases above mentioned, undertaken to dispose of an infant's land or inheritance in real estate, and that although many cases have arisen in which the income of an infant's
117 estate has been found to be entirely insufficient for his support, yet it has rarely occurred that the court has broken in upon the capital of even his personal estate for the purpose of maintenance, though it has frequently done so for his education and putting him out in life."

If any Maryland authority existed before this date for the power more recently asserted by the court of appeals, Chancellor Bland would surely have known it and referred to it.

It could hardly be, then, that any such opinion prevailed in Maryland thirty years before the date of his opinion.

But even were it otherwise, it is to be observed that the proposition asserted by the court of appeals does not go far enough to be available for this discussion. It declares the power of the chancery to decree a conversion, but no more. It does not assert the power to do that on account of the maintenance and education of the ward, and to apply the proceeds to those objects; and the very ground on which the special act on which the case of Dorsey *v.* Gilbert was based, was justified as constitutional, was that, while it was only an enlargement of the existing power of the court of chancery, "the property of the infant is not (by it) in any manner impaired or lessened, but a change in its character alone effected."

We may safely assume, then, that before the act of 1798 there was no authority in any court in Maryland to decree a sale of an infant's realty for maintenance or education, or for any object except those provided for in the statutes referred to.

If he possessed personalty, the orphans' court might allow his guardian to apply a tenth part of it annually for his education, under authority of the act of 1785, ch. 80.

But if he was an orphan having no legal claim for support upon any one and his whole patrimony consisted of unproductive realty, his condition was lamentable. However refined his associations may have been and however capable he might be of receiving a liberal and professional education, his only recourse for a support was to be bound out as an apprentice under the act of 1715, ch. 39, unless some charitable person would assume his maintenance and education. His real estate, however ample, was unavailable for those objects, unless, indeed, he would go in debt for necessaries and leave his creditors to their common-law remedies against his property.

In this condition of affairs the act of 1798, ch. 101, was enacted "for amending and reducing into system the laws and regulations concerning last wills and testaments, the duties of executors, administrators, and guardians, and the rights of orphans and other representatives of deceased persons," the 12th sub-chapter, section 10, of which says: "And once in each year, or oftener if required, a guardian shall settle an account of his trust with the orphans'
118 court; and the said court shall ascertain, at discretion, the

amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects, and destination of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate and to make use of his principal and sell part of the same under its order: Provided, nevertheless, that no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the court of chancery or general court, as well as of the orphans' court."

It will be observed that the power conferred is not in terms limited to personal estate. The income of the estate may be exceeded and part of the principal may be sold.

It will not be disputed that the terms "estate" and "principal" are comprehensive enough to embrace everything, real and personal, owned by the infant. Is there anything in the context or in the subject-matter to limit their sense in connection with the power of sale conferred?

Sec. 5th provides that on the guardian's executing his bond the court shall have power to order the land, distributive share or other property of the ward, to be delivered to the guardian.

Sec. 6th directs the guardian to have the real estate appraised and the annual value thereof estimated.

Sec. 7th forbids waste, but allows the wood to be cut down under order of the court for the ward's education and maintenance.

Sec. 8th directs the guardian to lease out the real estate or allows him to undertake it on his own account and be answerable for the annual value, to be every third year ascertained.

Sec. 9th directs the guardian to account for the profit and increase of the estate or annual value as aforesaid.

Thus the first of these sections grouped together the real and personal estate. Sections 6, 7, 8, and 9 refer entirely to the real estate. Sec. 9 speaks of it as the estate, and then follows immediately sec. 10, the one under consideration, in which permission is given to exceed the income of the estate—the precise word which in the preceding section referred to realty—and to sell part of the principal. As the preceding four sections had reference solely to real estate and the last described it generally as the estate, it is difficult to understand why the same word in this section should not embrace the realty.

The power to sell the personalty—10 per cent. of it annually—already existed under the act of 1785, ch. 80. If it was intended by the act of 1798 merely to re-enact this or to extend it to all the personalty, why was the phraseology changed and the word personal omitted?

119 If it does not appear from the foregoing considerations that it was omitted *de industria* and the power of sale was extended to the realty as an amendment to the existing law it is made demonstrably clear by the proviso to section 10th.

The function of a proviso in a statute is to qualify or restrain the enacting clause.

The enacting clause here confers a power to order sale of part of

the principal of the infant's estate on account of his maintenance or education. The qualification is that the real estate shall not be diminished on account of the maintenance or education without the approbation of the court of chancery, &c. Diminished how? Clearly it means by the exercise of the power of sale conferred in the preceding clause—*i. e.*, the realty shall not be diminished by such sale without, &c. Why add this qualification unless, without it, the orphans' court would have the unrestrained power of selling by virtue of the enacting clause?

Again, what do the words "as well as of the orphans' court," at the close of the section, mean, if not that the orphans' court is to allow a diminution of the realty by its order of sale first and that the approbation of the other court is to be had as well?

The proviso, then, clearly assumes that the previous clause conferred the power to order a sale of the realty and it was designed as a check upon its exercise.

There is no question of implied or incidental powers.

The question is whether the power to allow the guardian to exceed the income of the estate and to sell a part of the principal does not mean, if the estate consists of realty, as in this case, a power to exceed the income of the realty and to sell part of that for the maintenance and education of the ward. The context is resorted to not to infer powers not expressed, but to throw light on the express grant, if it needs any elucidation.

More properly it may be said that the proviso is referred to as irreconcilable with the position that the expressed grant means less than its terms naturally import and ought to be narrowed and restrained by construction.

The conclusion seems to me inevitable that the statute conferred upon the court the power to order a sale of part of the minor's real estate for his education and maintenance.

Allusion has been made to the non-existence of any practice under this section of the statute in Maryland and the absence of any adjudicated case sanctioning such a practice.

The act of Assembly of Maryland of May 8th, 1816, would account for the non-existence of the practice in that State since that date. The act provides for sales of infant's property by decree of the chancellor or of the several county courts of the State sitting as
120 courts of equity. The 8th section enacts that "no part of the principal arising from the sale of any real estate by virtue of the law shall be applied toward the maintenance or education of any infant, unless the chancellor or the county court, as the case may be, shall consider it necessary for the education or maintenance of the minors." This, by implication, gives to the chancellor or county court the power to order the application of the principal to the minor's maintenance or education. As this act was very comprehensive in its provisions and could be administered by any of the county courts sitting in equity, it is quite likely that it superseded the antecedent legislation in the practice of the courts and occasion did not arise for direct judicial decision of the question now before us.

But whatever expression of opinion we find in the Maryland courts or other authorities is in favor of the interpretation we have given to the statute.

In the Williams case, decided in 1828, which was a case under the act of Maryland of 1816, Chancellor Bland, as already stated, discussed the whole subject of the power of the court of chancery to decree the sale of realty owned by infants. He also reviewed the legislation of Maryland on the subject, including the act of 1798, now under consideration. In his report of the case, published in 1841, he adds, in a note to this part of his opinion, a reference to the Goltier case, decided by Chancellor Kilty in 1810.

In that case the father of certain minors petitioned the orphans' court, setting forth that his children had inherited an undivided interest in certain real estate; that the other heirs had contracted to sell the property; that he believed it would enable him to educate and support the children more advantageously if he should sell and convey on behalf of the children also, and asked that he be authorized to make the conveyance. The orphans' court passed an order authorizing it, and Chancellor Kilty afterwards approved it, expressly under the power vested in him by the act of 1798, ch. 101, &c.

This case is extracted from the chancery proceedings. It shows that before 1816 the act of 1798 was understood by at least one orphans' court and the then chancellor as we have heretofore understood it, and it may be considered as evidence that our practice existed in Maryland at that time. It is a circumstance, too, not without interest that Chancellor Kilty had been the chief justice of the circuit court of the District up to the year 1806, about five years before the Goltier case was decided.

This case is cited by Chancellor Bland, as already stated, in a note to his review of the Maryland statutes without comment, and it is to be assumed that he refers to it as an authoritative exposition of the law.

121 In the same note he refers to the case of Brodess *v.* Thompson, 2 Harris & Gill, 120, decided in 1828 also.

That was an action for the value of certain improvements constructed on the defendant's real estate by authority of his guardian, who had contracted to apply part of the ward's principal to payment for them, and that with the sanction of the orphans' court.

The question was whether the orphans' court had authority to allow the guardian to exceed the income and apply part of the principal to any other object than the maintenance and education of the ward.

The court of appeals held not and said: "By the 9th section of that law (the act of 1785) the orphans' courts are invested with the authority to allow the guardian to apply a part of the personal estate, not exceeding a tenth part thereof, to the education of his ward. The act of 1798 only enlarged this authority by extending the expenditure to any part or the whole of the personal estate if necessary. The better education of the ward is the object of both laws, and the general expressions used in the 10th section are to be con-

strued with reference to this object. * * * That the Legislature did not mean to extend the principal to any of the objects than those personal to the ward is plain from the language of the 10th section, in the closing part of it: 'No part of the real estate shall, on account of such maintenance or education,' be diminished without, &c., * * * clearly indicating by the relative term such maintenance or education the object of expenditure authorized in the first part of the same section. Should an application of the personal estate not suffice to maintain and educate suitably to the future destination of the ward, then such maintenance and education may also induce an application of a part of the real estate, with the approbation of the court of chancery or general court, as well as the orphans' court."

This seems to be a clear recognition of the powers of the orphans' court to decree the sale of the realty, and it was evidently so understood by Chancellor Bland when he cited this case in the same note with the Goltier case before referred to.

So, in the case of Hatton *v.* Weems, 12 G. & J., 83, decided in 1841, which was a suit brought by a *cestui que trust.* against the trustee of an estate for an account, the court referred to an analogous case of a guardian, and said: "According to our laws a guardian cannot encroach on the capital of his ward's estate without the order of the orphans' court, nor can the real estate be diminished but by the approbation of the court of chancery."

Although not so pointed as the other case, this seems also to recognize the order of the orphans' court, with the approbation of the court of chancery, as competent to transfer the realty of the ward.

122 Mr. Alexander, in his well-known and authoritative work on the Chancery Practice of Maryland, published in 1839 or 1840, says: "The court of chancery has a general control over the persons of infants in regard to their guardianship, maintenance, and marriage, but it is seldom that an occasion is presented for the exercise of these powers. The orphans' court may appoint a guardian to an infant who has acquired an estate in any manner and who is destitute of a testamentary or natural guardian. The power to appoint a guardian, with authority to take possession of the estate, has very naturally drawn to itself the power of appropriating the estate to the maintenance of the infant. The only case in which the interposition of chancery seems to be necessary is where a sale of a part of the infant's real estate is required for the purposes of maintenance and education." For this he refers to sec. 10 of the act of 1798, sub-ch. 12.

He, then, clearly understood the diminution of the ward's real estate, referred to in the act of 1798, to mean a sale of it, through the concurrent action of the orphans' court and chancery court.

We, have, then, the chancellor, the court of appeals, and the text writers of Maryland down to a late date recognizing as a thing of course the authority of the orphans' court to decree a sale of realty, and not an intimation of opinion against it from any quarter.

But if it had been otherwise since the session of the District of

Columbia it must be remembered that this statute came to us about two years after its enactment as the law of this jurisdiction without any interpretation by the highest court of Maryland, and the circuit court of this District had as complete authority to interpret it for this District as the court of appeals of Maryland had for that State; indeed, as much so as if it had been originally an act passed by Congress for this District.

In the exercise of this authority the circuit court, and, since its abolition, this court, its successor, have always interpreted the act of 1798 as conferring a power on the orphans' court to decree the sale of an infant's realty under the circumstances mentioned in section 10, sub-ch. 12, of the act, and it was assumed without discussion in the general term as late as 1874 in the case of Mansell's Appeal.

The practice of decreeing such sales has prevailed through a period sixty or seventy years in extent, large amounts of property have changed hands through such sales, and many titles depend upon their validity. If anything can be said to be a rule of property in this District our interpretation of the statute must be so considered.

123 This being the case, even if we doubted its propriety, would we be justified in reversing it, with the effect of unsettling titles and affecting values to an extent that cannot now be appreciated?

In the case of Doolittle *v.* Bryan, 14 How., 563, the court said: "In the present case it is said the land was sold in 1820; the purchaser paid his money and obtained his deed on the faith of a judgment of the court that the sale was regular, and has held the land under the title ever since. Hundreds of similar cases may probably be found where the same objections to the sale exist. Under such circumstances, a court should be even astute in avoiding a construction which may be productive of much litigation and insecurity of titles."

In the case of Smith *v.* Black, 115 U. S., 308, the mere probability that a decision of the old circuit court as to the power of a trustee to sell through an agent had been followed as a rule of property was persuasive with the Supreme Court against sanctioning a departure from it. How much stronger the present case, where we know that many titles rest upon the rule of property which is now assailed.

An important feature of the present case is that we are not sitting on appeal from an orphans' court decree of sale, in which case, even, we ought to hesitate to pronounce an opinion subversive of the settled rule of title, but we are called upon in a collateral proceeding to overthrow rights acquired over forty years ago under a decree never reversed or even appealed from, but passed at a time when its legality was assumed in the prevailing construction of the law.

The language of the Supreme Court in Douglas *v.* County of Pike, 101 U. S., 677, is quite pertinent to such a case. It was an action on certain county bonds issued and bought after their legality had been affirmed by the State court, but which subsequently the same court

held to be illegal. The court say: "The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment—that is to say, make it prospective but not retrospective. After a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

Therefore, although they ordinarily followed the interpretation of its statute by the highest court of a State, they refused, in that case, to give it the effect of overthrowing a former rule of decision under which rights had been acquired.

124 If this District were a State no doubt the Supreme Court would apply this rule by upholding our former construction of the statute as far as it affected the present case, however we might have changed our views of the law since.

And, although in the exercise of their appellate power in this District the Supreme Court would act upon their own judgment and not feel bound to follow ours in the interpretation of our local statutes, it can hardly be doubted that the sentiments above expressed would lead to the same results.

The next question is whether the act of 1798, ch. 12, sec. 10, is repealed by the act of Congress of March 3, 1843, entitled "An act to provide in certain cases for the sale of the real estate of infants within the District of Columbia."

There is no such repeal unless by implication. Repeals by implication are not favored by the courts.

In the absence of any repealing clause it is necessary to the implication of a repeal that the objects of the two statutes are the same. If they are not both statutes will stand, though they refer to the same subject.

And it is further necessary to such repeal that there be a repugnancy between the statutes or that one be plainly intended as a substitute for the other. U. S. *v.* Tynen, 11 W., 88; Claflin *v.* U. S., 97 U. S., 546.

125 The act of 1853 provides for the sale of the whole or any part of the infant's real estate whenever it appears that the interest of the infant manifestly requires it. The object, therefore, is to promote the infant's interest generally. When the sale is made the proceeds are to be vested and applied—*i. e.*, invested and applied—in the purchase of other real property or invested and applied in such other manner as the court may think best; and these proceeds, if the infant dies under age, are to be considered real estate and pass as such to the person who would have been entitled if no such sale had been made.

The prominent object of the act evidently is a change of investment for the infant's benefit.

And another object seems to be to preserve the fund for his heir-at-law in case of his death under age. As the infant could not

make a valid device the property, then, upon his death under age would necessarily descend to his heir; but a conversion of it into personalty would deprive the heir of it but for the particular provision of the act. There is no express authority to apply the proceeds otherwise than by vesting or investing them. They are to be vested and applied in a purchase of other realty or in some other manner. There is no authority to consume the principal. It is argued that such authority is implied by the words "so much thereof (*i. e.*, of the proceeds of sale) as may remain at his death shall be considered real estate," &c., &c.; but this evidently means so much thereof as may remain in the shape of personalty, because it was needless to say that of real estate; and that would apply to what was not reinvested in other real estate. It is not necessary to read it as of what remains after a part of the principal has been consumed. After directing that the proceeds might be reinvested in realty, this clause had for its object to impress the character of realty on all that might remain in the form of personalty for the benefit of the heir. It would be singular if a power to consume the principal was left to be inferred from a clause like this, which has manifestly a different object in view and does not necessarily convey such implication.

Somewhat singular consequences would follow such a construction. Whether a ward's realty shall be sold for his maintenance and education must depend upon his needs in those respects. It is natural to expect that the court charged with the duty of determining that question should also have authority to decree the sale.

126 The act of 1798 expressly directs the orphans' court to ascertain the amount to be annually expended in the maintenance and education of the orphan and authorizes it to apply a part of the principal of the estate to those objects. If this authority as to the sale of the real estate is cut off by the act of 1843, the power of the court to fix the allowance at anything beyond the personalty and the income is necessarily destroyed, because it is in the discretion of the equity court whether the realty shall be sold or not. The power would then have to be devolved on the equity court to determine the allowance of the ward. Could it have been intended to transfer to it this duty which is so exclusively appropriate to the orphans' court? Or could it have been intended to leave with the orphans' court the power to determine the ward's allowance for maintenance and education, beyond the income of the estate, and yet require a separate and original, instead of an appellate and revisory, proceeding in the equity court to give the orders of the former effect?

All this difficulty makes it very improbable that Congress intended to transfer the administration of the ward's property—in other words, the wardship of the infant—to the equity court by the act of 1843.

In the case of an exactly similar act in Virginia we have the authority of Reinecker *v.* Streit, 33 Grattan, 637, that it conveys no authority to apply the principal of the ward's estate to his mainte-

nance and education. If this be correct, as we are inclined to think it is, then the object contemplated by the act of 1798 could not be attained under the act of 1843, and the two acts must be held to have entirely different objects and to be entirely compatible with each other, and therefore both must stand according to the rule before stated.

But even if we can find in the act of 1843 an implied power to sell for the express purpose of applying the proceeds to the maintenance and education of the ward under the general authority to vest and apply for his benefit, it would not follow that the act is inconsistent with the act of 1798, and therefore repeals it. It would only follow that while the orphans' court could only direct a sale of part of the realty for the single object of maintaining and educating, the equity court could decree a sale of the whole of it for the promotion of the ward's interest in any way. There is no inconsistency in conferring on one court a jurisdiction which may include what already exists in another without intending to disturb the latter, but leaving their jurisdiction, to a limited extent, concurrent.

127 The later law may be intended as a substitute for the former, although not positively inconsistent with it; but it must appear plainly to be so intended. And how can that be predicated of the act of 1843 when the supposed power to the equity court, intended to supersede that of the orphans' court, is not expressed and can only be made out at all by doubtful implication?

We have seen that the court of appeals of Maryland, long after the act of Maryland of 1816 was passed, recognized this power of selling a ward's realty as still residing in the orphans' court, although by the effect of that act the proceeds of sale might be applied to maintenance and education, and although, too, the more usual practice in that State probably was to proceed under that act to secure such application.

If the act of 1816 in Maryland did not work a repeal of the act of 1798, *a fortiori* did not our act of 1843.

In the case of the United States *v.* Tynen, 11 Wall., cited on the part of the plaintiff, the Supreme Court found an absolute contradiction and repugnance between the two acts under consideration, so that they could not stand together.

In the case of Claflin *v.* United States, 97 U. S., 546, the second act expressly repealed all acts which either conflicted with or were supplied by the provisions of that act, and the Supreme Court held that the second act did supply the provisions of the first and was plainly intended as a substitute for it.

We do not think, then, that the act of 1843 repealed that of 1798.

Such are the general considerations which lead us to hold that at the time of the proceeding in the orphans' court which was offered in evidence at the trial that court had jurisdiction, on a proper showing, to order the sale of a part of the real estate of a ward for his maintenance and education.

Another question, however, is made, going to the jurisdiction in

this particular case, which grows out of the nature of the estate owned by the wards.

It is said that they owned only a remainder, and that a contingent one, and the jurisdiction is denied in such a case, though it may exist as to estates in possession.

What estate, then, had the Thaw children under the will of their father?

After giving a life estate to the wife he devised as follows, viz: "I give and bequeath to my two children above named, Columbia and Columbus, in equal parts, to their heirs and assigns forever, all my estate, real and personal, that shall remain at and after the death of their mother, my said wife Eliza; or if either of them shall not survive their mother, then I will that the surviving one shall have the whole.

128 "Item. If both of my said children shall die before their mother, then, on the demise of the last survivor of them, I give and bequeath to my beloved wife Eliza, to her heirs and assigns forever, for her own proper benefit, all my estate of every description."

A remainder is vested "when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate."

"It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder." 4 Kent's Comm., 194, 195.

But there was no moment after the death of Thaw when each of his children would not have had an immediate right to the possession of a moiety of the property upon the death of their mother. The remainder of each had always a present capacity of taking effect in possession if the possession became vacant by the mother's death. It was therefore a vested remainder. Inasmuch as the devise to each child in remainder was in fee, the devise over of his or her share, in case of his or her death before the mother, to the surviving child was simply an executory devise over of a fee after a fee. Such also was the devise to the mother and her heirs in case she survived both children.

But the children had more than a vested remainder.

The first devise is to the mother, "to hold and enjoy during her natural life, in trust for the equal benefit and maintenance of herself and of my daughter Columbia and of my son Columbus, the two children above named; and if either of them shall die before arriving at the age of majority, then she is to hold the whole property as above for the equal benefit of herself and the survivor of the two above-named children; or if both of the said children shall die before their mother, my said wife, then she, my said wife Eliza, shall hold the said property during her natural life for her own sole use and benefit, and in no case shall she, my beloved wife Eliza, be deprived of the use of any part thereof during her natural life for the maintenance of herself and the two children aforesaid, while they or either of them shall live, or of herself, if she shall survive them both."

It will be observed that no active duties are required of the trustee, unless that is implied in the use of the word "maintenance."

But in a case where a tract of land was conveyed to a father in fee, to hold in trust for children then alive, and to be born of his wife, to be equally divided, &c., and until the division to be occupied and used entirely and specially for the maintenance and support of the children, it was held that the legal estate vested in the children. McNish *v.* Guerard, 4 Strobt Eq., 66.

129 The court said: "I do not perceive in these words evidence that it must have been the intention of the grantor that the land was to be occupied or the rents received and disbursed by the trustee for the maintenance of the children. * * * A very strong persuasion certainly arises from the fact that the children were infants and that the deed was made to their father with a direction for their support, that it was meant this support should be administered through him. But, on the other hand, if the statute carried the legal estate to the children, all this could be and must necessarily be attended to by guardians, &c.

So that it is at least doubtful whether the children did not take a joint legal estate with their mother during her life.

But whether this be so or not, it is certain that they had the entire beneficial interest in the property, present and future, subject to their mother's equal participation with them during her life.

There might be serious objections to the sale of a mere remainder because of the uncertainty of its value and the risk of sacrifice, but such objection would not apply to an estate like the above, where the mother unites in the sale of her interest, and thus the whole title passes and the full value is realized.

But there is nothing in the act of 1798 to limit the terms real estate or principal to estates in possession or to exclude future interests from being sold equally with those in possession; and in the case of statutes of other States resembling ours the contrary has been expressly decided. Baxter *v.* Baxter, 62 Me., 543; Cooper *v.* Hepburn, 15 Gratton, 563.

It has been argued that the act of Congress of 1856, Rev. Stats. D. C., sec. 969, &c., provides for the sale of remainders and reversions in real estate, and thereby assumes that there was no existing provision on the subject.

The act in question provides for a sale of property limited for life with contingent remainder over to issue of the tenant for life who may be living at his death. It is the case of contingent remainders to uncertain persons who cannot be known until the expiration of the life estate. Of course, no such person could be before the orphans' court asking, through a guardian, for the sale of his interest, during the continuance of the life estate—an entirely different case from the present.

It is supposed that section 10 of sub-ch. 12 of the act of 1798 prohibits the sale of trust estates; but we do not understand it as having any such meaning. The clause relied on is the last of the sub-chapter, and it is "that nothing in this act contained shall be

construed to affect the general superintending power exercised by the court of chancery with respect to trusts."

130 There are five sections between this and the one giving the power of sale, so that it cannot have any special reference to the latter. It is a proviso relating to everything in the act; it qualifies all of it. If it prevents a sale of equitable estates it equally prevents the appointment of a guardian or the control of the natural or testamentary guardian wherever the ward's estate consists of equitable property. Such certainly could not have been the intention. The idea could only have been to reserve to the chancery court its usual power of calling a trustee to account and enforcing the performance of his duties, which could be done in concurrence with the special powers of the orphans' court with respect to guardians.

Apart from the statute, however, a question may be made as to the power of the orphans' court to decree a sale of an equitable estate when it cannot decree a conveyance by the trustee so as to give a complete title to the purchaser.

I see no more reason to doubt the power of the court in this respect than to doubt its power to sell a remainder, because it cannot compel the life tenant to join in the sale or its power to decree a sale of an undivided interest, as was done in the Goltier case, because the cotenants could not be compelled to join in the sale or in a partition. In the last case the purchaser could not get the full benefit of his purchase without a partition, voluntary or enforced, by suit in equity; and so the purchaser of an equitable estate would be entitled to demand a deed from the trustee and to enforce compliance by a suit in equity.

But no such question can arise in the present case, in which the guardian is the trustee and the very party seeking a sale.

Indeed, as it is clear that the trust in this case was purely personal to the children, it would cease of itself as an active trust at the moment of the transfer of their title, and the legal title would be transferred to the purchaser by operation of the statute of uses.

We think there was nothing in the nature of the estate to exclude the jurisdiction of the court to decree a sale.

The next question will be, What facts were necessary to give the court jurisdiction for this purpose?

Upon examining the statute we find no other jurisdictional facts necessary than the ownership of the property by a minor and the existence of a guardian.

131 "Whenever land shall descend on or be devised to a male under the age of twenty-one years or to a female under sixteen, * * * and such male or female shall not have a natural guardian or guardian appointed by last will, agreeably to the statute, the orphans' court of the county where the land lies, &c., shall have power to appoint a guardian, &c.; and the court shall also have power, on the application of any friend of the infant, &c., to call on any guardian under the statute aforesaid or natural guardian to give

bond, &c." On the execution of the bond the court may require the land, &c., of the ward to be delivered to him, may exact certain duties of him as to management and accounting, may, at its discretion, fix the yearly allowance of the ward for maintenance and education, and, if it shall deem it advantageous to the ward, may allow the income to be exceeded and order a sale of part of the principal.

It is not even made necessary to allege that the income is insufficient for his support. It may be sufficient to maintain and educate according to a certain scale of living, and yet the court may, in its discretion, make a larger allowance and authorize a sale. The insufficiency of the income is an argument addressed to the sound discretion of the court; but if such insufficiency be a necessary fact it appeared very explicitly in this case.

No particular form of application or allegation or proof is prescribed as necessary to give the court jurisdiction.

It is sufficient for the court, in however informal a manner, to be satisfied that a sale is advantageous to the ward with reference to his maintenance and education, and, as the Supreme Court say in Thompson *v.* Tolime, 2 Pet., 157, "The law nowhere requires the court to enter upon record the evidence upon which they decided that fact."

And, even if proof were required to be taken in a formal manner and recorded, the omission to do it would only be error, and not go to the jurisdiction of the court to decree upon the case before it. House *v.* Wiles, 12 G. & J., 338.

A purchaser under such a decree is not bound to look beyond the decree if it is such as the court had authority to pass upon the case presented. This has been so well settled by the Supreme Court as to require no argument. Doolittle's Lessee *v.* Bryan, 14 How., 567; Gregnon's Lessee *v.* Astor, 2 How., 343; Thompson *v.* Tolime, 2 Pet., 169.

The proceeding in the orphans' court is a proceeding *in rem*—is, in a sense, *ex parte* and summary.

132 It must be remembered that an infant may contract for necessaries, for his maintenance and education, and in that way subject his property to legal proceedings by his creditors. Shall he be subjected to the costs and they to the delay of formal procedure at law or in equity whenever it is necessary to satisfy his wants and their demands, or is it not better that some expeditious method be authorized of appropriating his property to his wants?

As Chancellor Bland says (Williams' case, p. 205): "An infant is, in general, incompetent to contract, but he may, by contract, bind himself for his maintenance and education, and hence a legislative enactment which facilitates such an application of his estate cooperates with the infant's legally qualified right to contract in discharge of a duty to himself without trenching upon any of his rights."

This proceeding is not more summary than the one provided for partition by the act of descents of 1786. Under that act one of several heirs, including minors, may petition a county court for a partition of descended lands. A commission is issued *ex parte*. There is no

summons, no guardian *ad litem* appointed to the minors, no answer from him or in his behalf, and yet the partition may be decreed on the report of the commissioners, and if they report it impossible the land may be sold by them and the infant's title extinguished, he having no say in the matter through a guardian *ad litem*, though his natural or testamentary or orphans' court guardian may except or appeal and may be heard as to the terms of sale. An appeal is provided to the court of chancery just as a review by that court was provided in the case of the orphans' court sale.

The difference was that the partition ordered by the county court was good unless set aside by the chancellor on appeal, whereas the orphans' court order of sale was not operative until affirmatively approved by the chancellor or general court.

In the one case the superior court had to reverse; in the other to concur.

In both cases the action of the superior court is revisory and not original.

In the act of 1798 the law declares, in substance, that the orphans' court may order a sale, but they shall not thereby diminish the realty without the approbation of the general court or chancellor.

As the power to order a sale applies equally to realty and personalty, it is to be presumed that the proceeding in the orphans' court is intended to be the same as to both.

133 The action of the orphans' court must precede that of the chancellor, and it is this action which he is to approve. He is not to order or decree a sale, which would be the appropriate terms for an original proceeding before him, but is to approve, which term is only appropriate to a revisory proceeding. And as the statute clearly contemplates a previous decree by the orphans' court, it must be this which is to receive his approbation.

It would be an extraordinary law which would allow the orphans' court first to decree a sale and then require a formal suit to be instituted in chancery or in the general court, which was a common-law court, covering precisely the same ground and prosecuted to a new decree. The natural query would be, Why this superfluity of procedure?

The reference to the general court, too, excludes the idea of an original proceeding in the higher court, because that court, having only common-law jurisdiction, had no form of proceeding for the sale of realty, except the sale under common-law execution.

If it be true that the action of the chancellor is revisory only, then the ordinary formalities of an original suit in equity are not required.

The common law of the courts only knows of the removal of proceedings from inferior to higher courts by appeal, writ of error, or certiorari for the purpose of reversal, but nothing of a removal for approval, and supplies no formula for the latter, which is a statutory proceeding.

The statute prescribes no formalities by which the chancellor is to take cognizance of the proceedings in the orphans' court, but

leaves that to be adjusted by the rules or practice of the courts.

134 And now as to the facts:

However imperfect the files and records of the orphans' and circuit courts were, we have no doubt that the evidence supplied from them was properly admitted at the trial. The evidence in the record shows that the two infants before mentioned, Columbus and Columbia Thaw, derived title to the property in controversy under the will of their father; that Ellen V. Thaw, their mother, bonded as their guardian on the 22d of March, 1844; that on the 29th of that month she filed her petition showing that she had paid all the debts of her husband; that the property left by him was insufficient to support her and the children; that a part of it consisted of two vacant lots (the property in controversy), and praying that it be sold to relieve the immediate wants of the petitioner and for the support and education of the children; that a decree for such sale was passed on the same day, which was afterwards approved in the circuit court on the 12th of October following; that a sale was made which was approved by the circuit court on the 21st day of January, 1848, and a conveyance made by Mrs. Thaw in pursuance of it on the 17th of March, 1848.

As far as concerns the interest of the infants in the property, the court had before it everything which was necessary to give it jurisdiction to decree a sale.

It is true that the guardian in her application confused somewhat her own interests with those of the wards, and alleged the insufficiency of the property to support herself and the children as a ground for selling, and asked the sale as well to relieve her own immediate wants as for the support of the children.

But it is fair to read this part of the application as referring to her own undivided interest for life in the property. It is not to be read as an application to sell the estate of the children for her support. It is also true that the court had no jurisdiction over the wife's interest in the property and could not pass title to it by its decree. But if the wife chose to unite in the sale and convey her interest, which she must be held to have done, we see no reason why the court could not decree a sale of the share of the infants as was done in the case of Baxter *v.* Baxter, 62 Me., *supra*, in which the court said: "As after the decease of the father the whole estate is in the children, a sale of the right of the children, with a conveyance from the father, would vest the whole estate in the purchaser."

135 And if there was error in the form of the decree because it embraced the widow's interest also, it did not affect its efficacy as to the interest of the infants, but was a harmless and inoperative error not to be noticed collaterally.

The only question that could arise would be as to the proper apportionment of the proceeds between the mother and the wards; but this question could only arise after the sale and would not affect the transfer of title.

Holding these views, it follows that one must hold that the court below correctly admitted the evidence as to the sale and conveyance

under the authority of the orphans' court, which is the evidence set out in the first three bills of exceptions.

The 4th bill of exceptions related to the admission in evidence of a deed of partition between the plaintiff and his sister, in which he recites that his mother, after disposing of the real estate acquired by his father's will and investing the proceeds in other real estate, died intestate, &c.

Prima facie this would seem to be an admission of the sale of the property in controversy by the mother and an investment of the proceeds in the property then to be divided. As such we see no error in receiving it, but it was in no sense an estoppel and was open to explanation, which was given in the rebutting evidence.

The 5th bill of exceptions relates to the refusal of the court to grant five instructions, all of which, according to the views before expressed, were erroneous and were rightly refused.

The last bill of exceptions is peculiar. It shows that two instructions were asked on behalf of the defendant, both of which were granted against the plaintiff's objection, and at the same time the justice stated that there was no substantial disagreement between the parties as to the facts, and that he held that the plaintiff could not prevail against the title which the defendant furnished, and instructed the jury to find for the defendant, to which the plaintiff excepted. It does not appear whether the exception was to the granting of the instructions prayed or to the statement that there was no disagreement as to facts, or the instruction that the plaintiff could not prevail against the title furnished by the defendant or the final peremptory instruction to find for defendant.

We are not bound to notice this exception, and there is less occasion for it, because after the previous rulings below, which we have sustained, it could do no harm if technically erroneous.

The motion for a new trial is overruled.

Hagner, J., dissenting.

136 *Decree, Gen. Term. Oct.* 11, 1886. 5 *M. G. T., p.* 450.

Final decree, general term.

COLUMBUS THAW, Plaintiff,
vs.
MARIA RITCHIE, Defendant. } At Law. No. 24092.

This cause having been argued by counsel on both sides and *and* by them submitted to the court, it is, after due deliberation thereupon, considered by the court here that there is no error in the record and proceedings of the special term, and that its judgment be, and it is hereby, affirmed, with costs to be taxed by the clerk, and the motion for a new trial is accordingly overruled, from which decree in open court the plaintiff prays his appeal to the Supreme Court of the United States, which is allowed, and the bond of appeal thereto is fixed in the penalty of five hundred dollars.

137 In the Supreme Court of the District of Columbia, the 1st day of November, 1886.

COLUMBUS THAW, Plaintiff,
vs.
MARIA RITCHIE, Defendant. } No. 24092, Law. In Error.

Know all men by these presents that we, Columbus Thaw, principal, and Henry C. Coburn and Robert O. Edmonston, sureties, are bound unto the above-named Maria Ritchie in the sum of five hundred dollars, to be paid to the said Maria Ritchie, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this first day of November, 1886.

Whereas the above-named Columbus Thaw has prosecuted his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Columbus Thaw shall prosecute his said writ to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

COLUMBUS THAW. [SEAL.]
H. C. COBURN. [SEAL.]
R. O. EDMONSTON. [SEAL.]

Sealed and delivered in presence of—
R. J. MEIGS, JR.,
As to all.

Nov. 1, '86.

Approved:
W. S. COX, *Justice, &c.*

138 (Copy.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Columbus Thaw, plaintiff, and Maria Ritchie, defendant, No. 24092, at law, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly,

to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 4th day of November, in the year of our Lord 1886, and of the Independence of the United States the 111th.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Ass't C'k.*

DISTRICT OF COLUMBIA, *To wit:*

To Maria Ritchie:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Columbus Thaw is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

——.

Service acknowledged this 4th November, 1886.

APPLEBY AND EDMONSTON,
Att'ys for Maria Ritchie.

139 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE, SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 5th day of November, 1886.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 5th day of November, 1886.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 5th day of November, 1886.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 264. Columbus Thaw, plaintiff in error, *vs.* Maria Ritchie. Filed November 8, 1886.

Supreme Court of the United States.

OCTOBER TERM, 1889.

COLUMBUS THAW,
PLAINTIFF IN ERROR,

v.

MARIA RITCHIE,
DEFENDANT IN ERROR.

No. 264.

BRIEF FOR PLAINTIFF IN ERROR.

F. P. STANTON,
S. R. BOND,
Counsel.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

Supreme Court of the United States.

OCTOBER TERM, 1889.

COLUMBUS THAW,
PLAINTIFF IN ERROR,
v.
MARIA RITCHIE,
DEFENDANT IN ERROR.

No. 264.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

This was an action of ejectment in the Supreme Court of the District of Columbia, brought in 1882, for the recovery of the real estate described in the declaration, being one undivided half of a part of two lots in square 160, in the city of Washington, containing about 10,000 square feet.

General issue and replication in due form.

On the trial the plaintiff proved title by an unbroken chain of conveyances from the United States to his father, Joseph Thaw, who died in 1840, seized of the property in dispute, and leaving a widow, Eliza V. Thaw, who was his second wife, and, among other children, two by her, the plaintiff, born in 1831, and his sister, Columbia Thaw, older than plaintiff, and since intermarried with one John Littell.

(*Transcript, pp.* 5 *and* 6.) The plaintiff claims title under the will of his father, which is found in the *Transcript, pages* 6 *and* 7.

Plaintiff then proved that his sister, Columbia, had conveyed her undivided half of the property in dispute to Agricol Favier, in 1848; and that, subsequently, Walter S. Cox, trustee appointed in equity proceedings for the partition of the real estate of Agricol Favier, then deceased, made a conveyance of the whole of the property, of which the one-half is now in dispute, to one E. C. Ingersoll, from whom it was also shown the defendant assumes to derive her title as now claimed in this suit (*Transcript*, p. 7).

It was also proved that plaintiff's mother, Eliza V. Thaw, died in 1866, and that the property in dispute was then, and has ever since been, open ground without any fence, building, or other improvements (p. 7).

It was also proved (*Transcript*, pp. 7 and 17) that the whole property, of which one-half is in dispute, was worth at date of trial from over $12,000 to $20,000.

The defendant, to sustain her defence, introduced the docket entries in the Orphans Court and in the Circuit Court of the District of Columbia, and some other papers connected therewith, as the same appear in the first bill of exceptions at pages 8 to 12 of *Transcript.*

The defendant also introduced a certified copy of a deed from Eliza V. Thaw to Agricol Favier, purporting to have been made in 1848 and recorded in 1867, which is incorporated in the second bill of exceptions (*Transcript*, pp. 15–16).

Exceptions were duly taken to the introduction of all this evidence, as well as to the instructions of the Court to the jury. Under the instructions of the Court the jury found a verdict for the defendant. On appeal to the General Term a new trial was awarded, and judgment to that effect entered; but on a rehearing the former decision of the General Term was reversed and the judgment below affirmed.

Assignment of Errors.

The errors complained of are as set forth in the six several bills of exception, viz:

1. The admission in evidence on behalf of the defendant of the entries and documents in the Registry of Wills of the District of Columbia, appearing on pages 8 to 12 of the *Transcript of Record*, which were offered to establish the jurisdiction of the Orphans Court and prove title to the property in question in the defendant.

2. The admission in evidence of the deed from Eliza V. Thaw to Agricol Favier of the property in question, as set forth on pages 15 and 16 of *Transcript*, for the same purpose.

3. The admission in evidence of the proceedings in chancery cause No. 1,253, of Jardine *v.* Favier, for the sale of the real estate of Agricol Favier, deceased, and of the deed from Walter S. Cox, trustee, to Ebon C. Ingersoll of the lots in question, and deed of same from Ingersoll to Mary J. France, and her will devising her real estate to the defendant, and also the docket-entries and proceedings of cases in the late Circuit and the present Supreme Court of the District of Columbia, to show what the practice had been in said courts as to the sale of real estate of infants, which evidence, so admitted, is set forth on pages 16 and 17 of *Transcript*.

4. The admission in evidence of certified copy of deed of partition, dated March 1, 1871, between the plaintiff and his sister, of certain real estate other than that in question, as set forth on pages 20 and 21 of *Transcript*.

5. The refusal of the court to instruct the jury as requested by plaintiff's prayers, or either of them, viz:

"1st. Under Joseph Thaw's will, during the life of Mrs. Thaw, his widow, she held the legal title to the real estate

devised thereby for her life, in trust for herself and the two children, Columbia and Columbus, according to the terms prescribed in the will. The interest which Columbus Thaw took in the real estate under his father's will during the life of his mother was a remainder in fee after the termination of her life, and was not an estate in possession until after the death of his mother. The Orphans Court had no power during Mrs. Thaw's life to decree the sale of the estate in remainder of Columbus Thaw. Her deed, therefore, purporting to convey said estate is void.

"2d. The Maryland act of 1798, chapter ci, sub-chapter 12, section 10, did not apply to remainders, and such estates of infants were not subject to sale on petition of the guardian to the Orphans Court, with the approval of the Court in Chancery, as provided in said act.

"3d. The alleged entry in the records of the Orphans Court, purporting to be of the date of January 21, 1848, in these words: 'Sale of real estate of Jos. Thaw, dec'd, filed; order of approval for,' is indefinite, uncertain, and insufficient to authorize Mrs. Thaw's deed, inasmuch as it does not state what sale, or what real estate was sold, nor by whom, to whom, or for what consideration the sale was made, and inasmuch as no report of sale is shown, and no guardian's account and no record evidence of any payment whatever, and the deed itself does not recite any consideration.

"4th. The act of Congress of March 3, 1843, entitled 'An act to provide in certain cases for the sale of the real estate of infants within the District of Columbia,' repealed the Maryland act of 1798, so far as concerned the sale of the real estate of infants, and since that act of Congress was passed the real estate of infants could only be sold upon a bill filed therefor, as prescribed by said act of Congress; and as no such bill was filed in reference to the real estate in question, the deed of Eliza V. Thaw to Agricol Favier did not convey the interest of Columbus Thaw therein.

"5th. The Orphans Court of the District of Columbia, at the date of the proceedings therein relating to the sale of the real estate by Eliza V. Thaw, guardian, was one of

limited jurisdiction, and a party claiming title to real estate under its proceedings must show affirmatively that it had jurisdiction, and that not having been shown in this case, the deed from Mrs. Thaw to Agricol Favier did not convey the interest of the plaintiff in the real estate in question. (*Transcript*, pp. 22 and 23)."

6. The Court erred in instructing the jury as requested by the defendant, viz:

"The power given to Eliza V. Thaw by will of Joseph Thaw, read in evidence; the petition of Eliza V. Thaw, (the mother and guardian of the plaintiff), which was filed by her in the Orphans Court and which has been offered and read in evidence; the order or decree of the Orphans Court (which has been offered and read in evidence), made on said petition, &c.; the decree of the Circuit Court affirming the decree of the Orphans Court, as shown by the papers and entries in cause No. 344, rules 4, which have been offered and read in evidence; and the giving of the bond as required by said Orphans Court, and the sale, if made thereafter by said Eliza V. Thaw, as recited in the deed from her to Agricol Favier, which has been read and offered in evidence; and the ratification of said sale, if made as recited in said deed, and the execution and delivery of said deed, and the signing, making, execution, and recording of the deed between the plaintiff and his wife and Columbia Littell and husband, which have been offered in evidence, are sufficient to constitute a bar to the recovery by the plaintiff in this action of any estate or interest acquired by said plaintiff under the will of Joseph Thaw, which has been offered in evidence.

"2d. The recitals in the deed offered and read in evidence from Eliza V. Thaw to Agricol Favier, if said deed was accompanied or followed by the possession of said Agricol Favier and those claiming under him, are evidence of the facts recited" (p. 23 of *Transcript*).

And the Court also erred in instructing the jury to find a verdict for the defendant (same page).

The two elaborate opinions of the learned Justices in the court below, which are printed in the record, beginning at page 34, will save us some trouble in the presentation of the case and give aid to this Court in its deliberations.

The Supreme Court of the District first decided, without dissent, in favor of the plaintiff, the opinion being read by Mr. Justice Hagner, and judgment was entered accordingly reversing the judgment of the special term and remanding the cause for a new trial; but on a rehearing the former decision was reversed and the judgment below affirmed, Justice Cox reading the new opinion and Justice Hagner dissenting.

The principal questions for consideration are:

First. Did the Maryland act of 1798 give jurisdiction to the Orphans Court, with the approval of its order by the late Circuit Court, to decree the sale of real estate of infants?

Second. If such jurisdiction was conferred by said act was it in force in this District at the date of the alleged decree and sale, or was it repealed or superseded by the act of Congress of March 3, 1843, entitled "An act to provide in certain cases for the sale of real estate of infants within the District of Columbia"?

Third. Assuming that the act of 1798 conferred upon the Orphans Court the power to decree the sale of an infant's real estate under its provisions, does the record in this case show that it acquired jurisdiction for that purpose and that the alleged sale was legally made?

Fourth. Was the infant's interest in the property in question real estate in such a sense as to be the subject of such a sale?

Fifth. From the contention of the learned counsel of the

defendant in the court below the further question is raised whether the alleged practice of the Orphans Court of the District of Columbia is binding upon this Court of final review, so that it must sustain that practice, although it shall find that it was contrary to law and to the rights of the parties in interest.

I.

As to the Construction of the Maryland Act of 1798.

That act, chapter ci, sub-chapter 12, provides in section 6 that every guardian appointed by the court having the care of real estate, shall, within three months after executing his bond, procure the said estate to be viewed and reported on by two skillful, discreet persons, not related to either party, and appointed by the Orphans Court, who shall take an oath to appraise the same without favor or prejudice, and shall estimate the annual value thereof, and set down what improvements, &c., are on the land, and their condition, &c., and shall make a certificate of all they have done, and the same shall be returned by the guardian to the Orphans Court within three months.

Section 7 provides that "No guardian shall commit waste on the land, but the court may, on his application, allow him to cut down and fell wood and account for the same, in case it shall deem the same advantageous or necessary for the ward's education and maintenance."

Section 8 provides that the guardian shall either cultivate or lease such real estate, or may with the court's approbation, undertake the estate on his own account and be answerable for the annual value.

Section 9 provides that the guardian shall account for all profit and increase of the estate, &c.

Section 10 is as follows:

"And once in each year, or oftener if required, a guardian shall settle an account of his trust with the Orphans Court; and the said court shall ascertain at discretion the amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects, and destination of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate and to make use of his principal, and to sell part of the same, under its order: *Provided, nevertheless,* That no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the Court of Chancery or general court, as well as of the Orphans Court."

This proviso is claimed by the learned counsel for the defendant to confer upon the Orphans Court plenary power, upon the *ex parte* petition of the guardian, without bill or citation of any kind to the infant, to pass a decree for the sale of his real estate upon an *ex parte* ratification of the decree by the late Circuit Court, and this in the face of the express provision in the same act establishing the Orphans Court (sub-ch. 15, sec. 10), "that the said Orphans Court shall not, under any pretext of incidental power, or constructive authority, exercise any jurisdiction whatever not expressly given by this or some other law."

We deny the correctness of this interpretation of the act of 1798. Mr. Justice Hagner, in his opinion (*Transcript*, pp. 39–42), shows that the courts of Maryland never so construed the law or adopted the practice on which the defendant depends to establish her title, notwithstanding the single case of Goltier cited in that behalf, and of which he produces a certified copy of the actual record (*Transcript*, p. 33). He goes still further, and proves, we think, by cogent

and unanswerable argument, based on citation of ample authorities, that the provision of the Maryland law relied upon in this case was not intended to, and did not, authorize the Orphans Court to decree, or to take any part in the proceedings for, *the sale* of an infant's real estate. Mr. Justice Cox answers these arguments with much astuteness, but we submit that the weight of reason and authority is with the former. Looking at the specific and guarded provisions of that act to protect the rights of an infant in respect to his personalty, and to his slightest interest in the realty, such as the cutting and selling wood therefrom, or its careless cultivation even, it is beyond reason and belief that the same legislative body should, in the same act, have intended to confer upon the Orphans Court, to which it positively prohibited the exercise of any incidental or constructive jurisdiction, authority to sell the infant's realty, including timber and improvements, without the slightest direction as to the manner of sale or the proceedings by which the same is to be effected.

The authority, if any, must be expressly conferred. Where are the words found which give any such express grant of power? The brief proviso, negative in its terms, "that no part of the real estate shall, on account of such maintenance and education, be *diminished* without the approbation of the Court of Chancery or General Court, as well as of the Orphans Court," is the sole expression in the law upon which our opponents rely as the grant of such power. The words *sell* or *sold* do not occur in it. How, then, can it be maintained that this proviso contains an express grant of authority to sell or cause to be sold? But there can be a *diminution* without a *sale*, a diminution of the proceeds of that which has been sold, and which still retains the character, as real estate, of the source for which those proceeds have been derived; and we hold the true

construction of the proviso to be this: That after a sale of real estate through a bill and proceedings in chancery the fund realized therefrom shall remain as real estate, and this fund shall not be diminished except as provided. In no other way can we explain the use of the word "*diminished*" instead of *sold*. If it was intended to confer the power to *sell* real estate it would have said so, as nothing was to be taken by implication. The acts of Congress of 1843 and 1856, relating to the sale of real estate of infants, &c., explicitly treat the proceeds of such sale as real estate standing in the place of that which was sold. (Sections 968 and 973, Rev. St. D. C.)

In the Maryland system of jurisprudence at that time there was no necessity to confer such power upon the Orphans Court, nor could any exigency arise wherein the interest of infants could demand its exercise; for whenever there was a proper occasion for the sale of the realty, the guardian could procure such sale through the more guarded and appropriate proceedings of a Court of Chancery.

The courts of Maryland have maintained the jurisdiction of the Court of Chancery of that State, independent of statute, to decree the sale of an infant's real estate upon a proper showing, and through proper proceedings. In Corrie's Case (2 Bland, 489), Chancellor Bland says it has always been admitted that the Chancellor of Maryland was invested with all the powers in relation to infants with which the Chancellor of England had been clothed.

In Dorsey *v.* Gilbert (11 G. & J., 87), the court says:

"It was an undoubted power of the Court of Chancery, before any of our legislative acts authorizing the sale of infants' estate, to convert the real estate of an infant into money; and many cases may be found where the guardians of infants, under particular circumstances, have been authorized to make this conversion. The Court of Chancery,

in the exercise of this jurisdiction, acted under a delegated authority from the king, who, as *parens patriæ*, had jurisdiction over the persons and estates of infants. The legislation of this State, in relation to the sale of infants' estates, is but a modification and enlargement of an acknowledged power. The property of the infant is not in any manner impaired or lessened, but a change in its character alone is effected, and that for his benefit."

The same doctrine is asserted in Downin *v.* Sprecher, 35 Md., 474; Long *v.* Long, 62 *Id.*, 33; Taylor *v.* The Peabody Heights Co., 65 *Id.*, 388.

Mr. Justice Cox, in his opinion (*Transcript*, p. 58), while admitting the assertion of this power by the Maryland courts, first argues against the existence of the power, and then says that the proposition asserted by those courts does not go far enough to be available for this discussion, because, while it declares the power of chancery to decree a conversion, that is, a sale, it does not assert the power to apply the proceeds of the sale to the maintenance and education of the infant.

We say this is precisely the office of the proviso in the act of 1798, viz: *after* a sale through chancery to authorize the application of the proceeds of the sale, by the concurrent action of the Court of Chancery and the Orphans Court, to such maintenance and education. In this way the act supplied a seeming defect in the then existing law whenever a case should arise where the infant's personal estate was insufficient for his support and education; but the instances are numerous which show with what caution the realty was allowed to be encroached upon, especially as its possession was a qualification to vote or to hold office; and until the act of 1785 (Ch. 80, Sec. 9), authorized the guardian to apply a tenth part of his ward's personal estate, annually, for his education, no part of the principal of the personalty could be so used. The Orphans

Courts were generally presided over by laymen presumably unqualified to supervise, especially without specific statutory directions, the often complicated proceedings, as practiced in a Court of Chancery, for the sale of real estate and the protection of all the rights and interests involved. There are numerous Maryland decisions showing how jealously the Orphans Court was excluded from control over, or interference with, real estate. In Stewart *v.* Patterson (8 Gill, 46), where that Court undertook to exclude a child from a share in the personalty to be distributed, because it was of the opinion that a conveyance to him by the testator of a piece of real estate was an advancement of greater value than his distributive share, the Court of Appeals held it to be error, saying, "With the real estate of the deceased the Orphans Court has no concern. Controversies in regard to real estate must be settled in another forum." And this was reiterated in Hayden *v.* Burch (9 Gill, 79).

It is argued by our opponents, in avoidance of the fact that the practice pursued in this case was never adopted in Maryland, that after the organization of the courts in the District of Columbia they were not bound to follow the Maryland courts in their construction of the act in question. We cannot deny that the District judiciary is independent of that of Maryland, though not of this Court, but maintain that the adjudications and practice in the State where the act was originally passed, and where it remained in force, certainly until 1816, and from which it was, in 1801, adopted as the law of this District, are most persuasive, if not conclusive, arguments in favor of the construction which they have placed upon the act. (Met. R.R. Co. *v.* Moore, 121 U. S., 558.) The learned counsel for the defendant have labored zealously to show that in various jurisdictions the Courts of Chancery have not had, or assumed to have, as a part of their general jurisdiction, the power to decree

the sale of an infant's real estate for his maintenance and education.

But we deem it wholly irrelevant to the argument what may have been the opinion or practice upon this question in any other jurisdiction than that of Maryland, as the only point in the argument is to shed light upon the intention of the legislative body which passed the act under consideration, and that intention must be judged by the occasion supposed then and there to exist for its passage. And, again, even if no such general chancery jurisdiction existed, the matter would only have remained after 1798 as it was before, an inconvenience which might have been regarded as offset by the preservation of an infant's realty intact, with all its attendant advantages and qualifications to the infant upon his reaching his majority, until the Maryland act of 1816, as, according to Rinker *v.* Streit, 33 Gratt., 663, cited by our opponents, was the case in Virginia until the act of 1873 was passed in that state.

Before closing this point of our argument we would call attention to section 16 of sub-chapter 12 of the act of 1798, which provides that "nothing in this act contained shall be construed to affect the general superintending power exercised by the Court of Chancery with respect to trusts."

As will appear when we come to comment upon the will of Joseph Thaw, the estate with which the Orphans Court attempted to deal in this case, was a trust estate during the life of Mr. Thaw, and therefore came within the inhibition above quoted.

II.

As to the effect of the act of Congress approved March 3, 1843, entitled "An act to provide in certain cases for the sale of real estate of infants within the District of Columbia" (5

St. at Large, p. 621, incorporated in Rev. St. D. C., sec. 957). This act was passed more than a year before the proceedings were instituted by Mrs. Thaw which resulted in the alleged sale, and about four years before the sale is supposed to have taken place, no date of sale anywhere appearing. It was in full force at that time, and we confidently claim that it superseded any authority that can possibly be held to have been granted by the act of 1798 to the Orphans Court to decree the sale of the real estate in question, and furnished the course of proceeding necessary to be pursued to accomplish that purpose.

That law enacts that—

"When the guardian of any infant shall think that the interest of his or her ward will be promoted by the sale of his or her real estate, or any part thereof, it shall be lawful for such guardian to exhibit his bill for that purpose in the Circuit Court of the District of Columbia. * * * In the bill so exhibited the guardian shall set forth, plainly and distinctly, all the estate, real and personal, to which such infant is entitled, and all the facts which, in his opinion, are calculated to show whether the interest of his ward will be promoted by such sale or not.

"The bill shall be verified by the oath of the guardian; and the infant, together with those who would be heirs to the estate if he or she were dead, shall be made parties defendant thereto. It shall be the duty of the Court to appoint some fit and disinterested person to be guardian *ad litem* for the infant, who shall answer such bill on oath; the infant, also, if above the age of fourteen years, shall answer the bill in proper person on oath.

"Whether the answer to the plaintiff's bill admit the facts alleged or not, commissions for taking depositions shall be awarded; and before the court shall have authority under this act to decree any sale, every fact material to ascertain the propriety of the sale shall be proved by clear and credible evidence, given by disinterested witnesses; depositions to be taken in the presence of the guardian *ad litem*, or upon interrogatories agreed upon by him.

"If, upon hearing the cause, it shall be proved to the satisfaction of the court by evidence taken as aforesaid, that the interest of the infant manifestly requires the sale of his real estate or any part thereof, and the court shall be of opinion that, by such sale, the rights of others will not be violated, it shall be lawful to decree such sale," &c.

It cannot, we think, be rationally denied that under this act a guardian might properly file a bill for the sale of his ward's real estate whenever such sale should be necessary for his maintenance and education, alleging, in the language of the law, that "his interests will be promoted thereby." No greater interests could exist for a young man than his maintenance, which involves life itself, and his education, which should enable him thereafter to maintain himself, and which would form his character and control his whole future career. It follows, then, that this act of 1843 did furnish a mode of procedure for the sale of an infant's real estate for his maintenance and education. The only remaining question is, Did it supersede the old doubtful and dangerous mode which had previously grown up in this District under the supposed authority of the act of 1798? Was it intended there should be two modes of proceeding so contradictory, the one so uncertain, unguarded, and unreliable, for promoting and protecting the interests of the infant, and the other so manifestly beneficent and well appointed for that purpose?

There is no exigency supposed to be provided for by the former act that is not included in the later one, which is broader in its scope, more definite in its provisions, and ample in every way to accomplish, by a better and safer method, everything that can possibly be contemplated by the former. On the well-settled principles of statutory construction, the former law, so far as it related to the subject-matter covered by the latter, was superseded and repealed by it.

(U. S. *v.* Tynen, 11 Wall., 88; Claflin *v.* U. S., 97 U. S., 546.)

Dwarris on Statutes, chap. 10, *p.* 641, says: "It is, as a maxim, generally true that if an affirmative statute, which is introductory of a new law, direct a thing to be done *in a particular manner*, that thing shall not, even though there are no negative words, be done in any other manner."

The same author, *chap.* 12, *pp.* 699, 700, also says: "It is therefore an established rule of law that all acts *in pari materia* are to be taken together, as if they were one law, and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system and having one object in view."

A similar act was passed in Maryland in 1816, and amended by act of 1818 (1 Dorsey's Laws, pp. 644, 693), providing for the sale of a part or the whole of an infant's real estate through the guarded proceedings of a court of chancery whenever it shall appear to the court, after hearing and examination, &c., "that it will be for the interest and advantage of the infant" to sell the same, and proceedings for the sale of infants' realty in that State have ever since been required by its courts to conform to the provisions of that law, though, like the act of 1843, it contains no repealing clause, and its title is to authorize the sale in "cases therein mentioned," as that of the act of 1843 is to authorize it in "certain cases."

Hunter *v.* Hatton, 4 Gill, 115.

Williams' Case, 3 Bland's Ch., 203–4.

That act provides that the proceeds of such sales shall be invested by the guardian, under direction of the Orphans Court, and that no part of the principal shall be applied towards the maintenance or education of the infant unless the chancellor, or county court as a court of equity, shall con-

sider it necessary for that purpose, thus carrying out the principle, for which we contend, that chancery proceedings were regarded as indispensable to effect a sale of the real estate which the Orphans Court had not been provided with the proper machinery to effect, while the concurrence of the two courts was deemed necessary to permit the fund arising from such sale to be encroached upon.

Tilly *v.* Tilly, 2 Bland's Ch., 436, appears to have been the first case arising under this law, and the decree of sale was passed by Chancellor Kilty, in which he states how the fund derived from the sale is to be treated and when it may be *diminished;* note "a."

The act of 1843, however, was more directly taken from the Virginia act of 1819, as found in the Code of that year, vol. 1, page 409, secs. 16 to 23, inclusive, "reducing into one the several acts concerning guardians," &c.

Virginia decisions are cited by our opponents to show that the act of 1819 conferred no power to apply the principal arising from the sale of an infant's realty to his maintenance and education. We do not contend that it did, and find no such authority in the courts of that State until the act of March 19, 1873, "to extend the powers of circuit courts in relation to the estates of infants," and which authorized the "circuit court in chancery" to apply the proceeds of an infant's real estate to his "proper maintenance and education, or other interests," where the annual income thereof was not sufficient for the purpose.

This only goes to show that the condition which the other side so greatly deprecates and uses as an argument in favor of their construction of the act of 1798, viz: that any other construction would leave an infant without the means of maintenance and education, existed in Virginia until so late a period as 1873; but we contend that the act of 1798 did confer the power to apply the *proceeds* of the sale of an

infant's realty to such a purpose, or, in other words, to *diminish* them.

In closing this point we will add that the practice in this District has now come into conformity with what we claim to be the only practice for the sale of an infant's real estate which has any legal warrant, as is shown by the list of cases filed by us and made part of the record (pp. 18–20), and by a comparison of the numbers and dates of those cases with those of the list filed by the defendant (pp. 24–29); and we do not think that a practicing attorney would now ask, or the Court grant, an order of sale upon proceedings similar to those pursued in this case; yet what is the law now, in that respect, was the law in 1844 and 1848, when the proceedings relied upon by the defendant were instituted and prosecuted.

III.

Whatever construction may be placed upon the acts of 1798 and 1843, we contend that the record totally fails to show jurisdictional facts sufficient to empower the Orphans Court to divest the plaintiff in error, then an infant, of his interest in the property in question.

The proceedings in the Orphans Court and in the Circuit Court of the District consist only of brief docket entries and of the certified copy of a petition in the former Court by Mrs. Thaw, not even describing herself as guardian, with a decree thereon, exhibited in the Circuit Court, and there, without any other pleadings or parties, summarily approved. The record of these doings is meagre, informal, and deficient. We are well aware that, in courts whose jurisdiction is not questioned, such deficiencies are overlooked and often supplied by intendment and presumption. The authorities quoted to show what great informali-

ties in such cases are disregarded, we do not answer, because we do not dispute them.

But we claim that the Orphans Court, at the time of these proceedings, was an "inferior court," in that sense which required every thing necessary to give jurisdiction to be shown in its record.

It is expressly made so by the act establishing it, which provides that "the said Orphans Court shall not, under pretext of incidental power, or constructive authority, exercise any jurisdiction whatever not expressly given by this or some other law."

Among the numerous decisions showing with what strictness this principle has been enforced we cite the following: Scott *v.* Burch, 6 H. & J., 67; Townshend *v.* Brooke, 9 Gill, 90; Conner *v.* Ogle, 4 Md. Ch., 425; Lowe *v.* Lowe, 6 Md., 347; Yeaton *v.* Lynn, 5 Peters, 230.

Referring back to the provisions of the act of 1798, as given under point I of this brief, we see with what specific safeguards the real estate of an infant is surrounded by sections 6, 7, 8, and 9. Then when we come to section 10, under which the alleged sale in this case is claimed to have been made, we find these safeguards still further maintained. Down to the *proviso*, for which such potency is claimed, this section is one single provision of the law, the several parts of which are separated only by commas and semicolons—in fact, it is one single sentence of which all the clauses are interdependent. It would seem necessary, therefore, that the Court should have the account required of the guardian, if not the report of the appraisers as per section 6, in order to know the condition of the estate and to determine the annual sum to be expended for the orphan. The language of the statute makes this a *condition precedent*, and surely it is only a reasonable condition for the sale of an orphan's realty.

But *neither before nor after* the proceedings in the Orphans Court was ever any account rendered by the guardian, much less any compliance with section 6. Not a vestige of such an account is anywhere to be found. Nor was there any approval of Mrs. Thaw's bond, as required by the decree as a condition precedent to making a sale (p. 10). There was no legal foundation for the proceeding and no jurisdiction.

The petition (*Transcript, pp.* 8–9) was that the property "be sold for the purpose of relieving the *immediate wants of the petitioner* and for the support and education of the children." The decree for sale was made in 1844, and provided that the guardian, before proceeding to act under it, should file her bond, with security, to be approved by the judge; but the sale, if sale there was, took place in 1848, and without any such approval, so far as appears; and it was to be ratified either by the Orphans Court or by the Circuit Court, or by both. We insist that some amount of money was to be realized by the sale, and that the approval of the bond, and the money, paid or to be paid, were *conditions precedent* to the sale and ratification. But we have only the entry in a famous scrap-book in these words: "Sale of real estate of Joseph Thaw, dec'd, filed. Order of approval for," this dated January 21, 1848. As to this scrap-book, and that no guardian's account was kept, see testimony pp. 12 and 13 of *Transcript*. Our learned brothers for the defence sought, below, to supply the omissions in the court record by the recitals in Mrs. Thaw's deed, to which the plaintiff was not a party, through which he does not claim, but claims by title anterior and paramount, and by which he cannot be affected or bound.

But even here they do not find evidence of any money paid or to be paid; there is the recital of a sale under the decree of the Orphans Court, but no consideration is mentioned—no sum of money whatever. And in this whole

record there is not a word to show a consideration paid, except where Mrs. Jardine (*Transcript*, p. 14) testifies that her father, Agricol Favier, "said he paid 2 cents per square foot for the property." A deed of bargain and sale without a consideration paid is void (Boardman *v.* Dean, 34 Pa. St., 252; Emery *v.* Chase, 5 Greenl., 232); much more would it be so in the case of a guardian's sale for the maintenance of his ward.

On this point Mr. Justice Hagner (*Transcript*, p. 46) makes these very pertinent remarks:

"The principal object of the application was the support of *the petitioner*, and to relieve *her* immediate wants; the needs of the children are certainly not the main purpose of the application, but they appear to be mentioned incidentally rather than relied on as its object. Indeed the sale of the interest, in remainder, of the children (in view of the age of the widow who lived twenty-two years afterwards) could have contributed but to an insignificant extent towards their then maintenance or education. What the lands brought at the sale nowhere satisfactorily appears; and in the deed from Mrs. Thaw to Favier (dated March, 1848, and first placed upon the records in March, 1867), the consideration is stated as 'the sum of ——— lawful money,' &c. Nor is there a particle of proof throughout the case that the infants ever received any benefit in any form from what may have been realized by the sale."

Mr. Justice Cox does not notice this important point. Throughout the whole of his elaborate opinion there is no allusion to it whatever. This omission is significant.

The proviso which immediately follows and qualifies the provisions of the act of 1798 commented on above has been construed to authorize the extraordinary proceedings shown in this case, that is to say, a simple petition by Mrs. Thaw, the guardian, though not stating that she is or acts as such, in the Orphans Court, and a decree thereon; and a certified

copy of this petition and decree exhibited in the Circuit Court and there approved summarily, *ex parte*, eventuating in the docket entry in the chancery rules No. 4, case No. 344, of date October 4, 1844. This is the whole case.

We deny the validity of this interpretation of the law of 1798. Is there anything in the phraseology of that law to justify a court in dispensing with all those preliminaries usually adopted to bring proper parties before it, and especially to protect the rights and interests of minors? Our learned opponents say this construction has been given by the Courts of this District, and that these, after the organization of this federal jurisdiction, were not bound to follow the Maryland courts in their practice under it. We cannot deny that the District judiciary is independent of that of Maryland, though not of this Court; but we still think they were bound by those great universal principles of justice which require all courts to have the parties fairly before them when adjudicating on their rights and interests, and to have the necessary facts ascertained upon which they are to act.

The jurisdictional facts must appear on the face of the proceedings; the judgment of a court without jurisdiction is void, and its proceedings must be in accordance with the fundamental and well-established principles of practice. Especially is this so of courts of limited jurisdiction, as we have shown above.

Bloom *v.* Burdick, 1 Hill., 130.
Thatcher *v.* Powell, 6 Wheat., 119.
Elliott *v.* Piersol, 1 Peters, 328.
Bank of the United States *v.* Richie, 8 Id., 128.
Shriver's Lessee *v.* Lynn, 2 How., 43.
Hickey's Lessee *v.* Stewart, 3 Id., 750.
Williamson *v.* Berry, 8 Id., 495.
Windsor *v.* McVeigh, 93 U. S., 274.

IV.

As to the interests of the infants in the property at the time of the alleged sale.

By the will of Joseph Thaw the widow was invested with a life estate "*in trust* for the equal benefit and maintenance of herself and of her daughter Columbia, and of her son Columbus." In the same clause it was provided that if either or both the children should die before the mother, she should hold the property, *during her natural life, in trust*, for the equal benefit of herself and the surviving child, and in case of the death of both children then "for her own sole use and benefit." This part of the will is explicit in creating a life estate only, and in raising a *trust* of that estate for the benefit of all three as long as the mother should live.

It was argued in the court below that this trust was executed by the Statute of Uses and the life estate of the children joined with the remainder in fee, thus clothing them with the absolute title to an estate of inheritance. We hardly think this position will be assumed here, for it cannot be maintained. At best, the children had only an interest in two-thirds of the life estate, which could not well coalesce with the remainder for the whole. But the absolute discretion of the mother over the life estate for the maintenance of the children prevented the merging of the two estates, if nothing else did.

It was also insisted that the expression used in the third item of the will giving to the two children "all my real and personal estate that shall remain at and after the death of their mother" implied an authority in the mother to dispose of the real estate during her life. Mr. Justice Hagner pertinently says the implied power given by these words is fully satisfied by confining them to the disposition of the

personalty. Moreover, the sale in this case was made under the authority of the Orphans Court, and not under any implied power in the will. But the principle asserted can not be sustained, as we think the following authorities show:

The case of Shriver *v.* Lynn (2 How., 60) is an instance of a life estate devised, with a devise of the fee, also, conditional on the birth of children to the devisee, the property being otherwise disposed of in the event of no child being born. The condition was held to be a condition *precedent*, and only a life estate was vested. So, in this case, the remainder was not vested.

In Smith *v.* Bell (6 Pet., 68), a life estate was given with power of "*absolute disposition*" to the wife, remainder over to the son, yet the Court, Chief-Justice Marshall announcing the opinion, held that the power of disposition applied only to the life estate and not to the remainder.

This was a disposition of the personal property, but in Brant *v.* Coal Co. (93 U. S., 326) the same principle was applied to a will devising real estate, and the case of Smith *v.* Bell was quoted with entire approbation. These cases seem to be decisive on this point.

Now, at the time of Mrs. Thaw's application to the Orphans Court in 1844, this trust estate for her life was in existence, separate and distinct from the remainder in fee. If the property was sold under the decree of that Court this trust was included and disposed of by Mrs. Thaw's deed. But if any thing in this case be certain and undeniable, it is that the Orphans Court was wholly without any jurisdiction over trust estates. (*Maryland act of* 1798, *ch.* 101, *sub.-ch.* 12, *sec.* 16.) We think this point decisive of the whole case.

That clause of the will which gives to the two children, and to their heirs and assigns, all the estate, real and personal, that shall remain after the death of the mother,

would undoubtedly have given the children a *vested* remainder in fee, if that had been all. But this clause is followed by another, which says, "if both of my said children shall die before their mother, then, on the demise of the last survivor of them, I give and bequeath to my beloved wife, Eliza, to her heirs and assigns forever, for her own proper benefit, all my estate of every description." Be it observed, that this last clause does not devise the property to the mother in the event of the children dying *without issue*, but simply on the condition of their dying before her. If both had married and had children and then died before the mother, we presume the last clause of the will would have prevailed, and the mother would have taken the estate. Did she not have an interest in remainder by virtue of this last clause giving the estate to her and her heirs, an event quite possible to happen? If the estate in remainder might take effect in her, it could not have been vested at the same time in the children. (Powell on Devises, vol. 1, p. 206, and vol. 2, ch. xiii.)

On this point let us consider the circumstances as they were in 1844. The mother was then in vigorous health, for she lived 22 years afterwards. The plaintiff was only 13 years of age; and it was by no means a remote possibility that the mother should outlive the two children, and have others as her heirs.

In 4th Kent's Commentaries, marginal p. 208, it is stated that "a limitation to two persons for life, remainder to the survivor of them," is a contingent remainder; and Blackstone's classification is quoted to the effect that there are only two kinds of contingent remainders, viz., "remainders limited to take effect either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*."

On this authority the remainder to the children was contingent, as between themselves, without regard to the mother;

for in the clause which gives them all the estate "that shall remain at and after the death of their mother," this further provision is contained: "Or if either of them shall not survive their mother, then I will that the surviving one shall have the whole." It was uncertain whether both, or either, or which of the two, would survive the mother; therefore, this uncertainty plainly brings the case within the principle quoted from Kent and Blackstone.

But the contingency is still further complicated by the next clause—the last item of the will—which gives the whole to the mother and her heirs in case of her surviving the children. There were double contingencies both as to persons and events; both as to the death of the several parties, and as to which of them would survive to take the remainder. From 14 Petersdorff, marginal pages 216, 217, we quote the following:

"It is further to be observed that, although a fee cannot, in conveyances at common law, be remounted on a fee, yet two or more several contingent fees may be limited merely as substitutes or alternatives, one for the other, and not to interfere, but so that one only can take effect, and every subsequent limitation to be a disposition substituted in room of the former, if the former should fail of effect; Loddington *v.* Kyme, 1 Ld. Raym., 203; other authorities, and Fearn. Cont. Rem., 547, 550; as where a will was made in these words: 'I give my messuage, &c., to my son J. S., for his life, and after his death to all and every his children equally, and unto their heirs; and in case he dies without issue, I give the said premises to my two daughters and their heirs, equally to be divided between them;' it was determined that both devices were contingent remainders in fee; Goodright *v.* Durham, 2 Dougl., 265, and other authorities. Such limitations are sometimes called limitations on a contingency with a double aspect; sometimes limitations on a double contingency, and sometimes concurrent or contemporary limitations; as to which denominations see

Doe *v.* Fonnereau, 2 Dougl., 504. But in all cases where the first contingent remainder is in fee, or where they are concurrent remainders, if the first remainder becomes vested, all the subsequent remainders are void; for then they become remainders expectant on the determination of an estate in fee-simple. 2 Cru. Dig., 286; Keene *v.* Dickson, 3 T. R., 495."

According to this authority, if the remainder in this case was vested in Columbus and Columbia Thaw, the subsequent contingent remainder to Mrs. Thaw would be void, inasmuch as it would be a remainder "mounted on a fee." But the last provisions of a will always prevail over preceding repugnant provisions; therefore, in order to give reasonable effect to the whole instrument it would seem to be necessary to construe the limitations as "on a double contingency" or as "concurrent limitations."

As contingent remainders are not subject to sale or conveyance, it matters not that here both parties to this double contingency are claimed to have united in the deed. The subject itself was unsalable, and the Orphans Court could have no power to decree a sale. 4 Kent's Com., marginal p. 261.

But we do not consider it a very vital question whether the remainder to the children, under the will, was technically contingent or vested. The fact that it was a remainder at all, which could not be in the actual possession of the guardian, and could not be administered by her for the benefit of the ward, was sufficient, we venture to assume, to take it out of the possible operation of the law of 1798. Let us suppose, then, for argument sake, that the remainder was vested in the children; and also that the Orphans Court had jurisdiction to sell real estate, and that the trust for the life of the widow was no obstacle; still we have to inquire whether a remainder like this could be considered such

property as the guardian was required to estimate and report upon with a view to determine what allowance could be made for maintenance; and whether it could be considered *principal*, in the sense of that term as used in the law.

Webster defines *principal* thus: "A capital sum of money placed out at interest, due as a debt, or used as a fund, so-called in distinction from *interest* or *profit*."

Capital is defined as "a stock employed in trade, manufactures," &c.

We think it very obvious that the word *principal*, as used in the law, does not designate real estate as such, but rather the *fund* that may possibly have been derived from the sale of property and invested for revenue. The term is not one usually employed to describe lands; and in a law which expressly prohibits the exercise of any implied powers, it would be a great stretch of authority to construe this word as including real estate, and indirectly authorizing the Orphans' Court to exercise a power which had been indisputably vested in the Courts of Chancery.

The construction placed on this law in the learned opinion of Mr. Justice Hagner is plainly the most reasonable and just, viz., that the Chancery Court alone could order the sale of lands, and then was to co-operate with the Orphans Court in disposing of the *principal*, or funds arising therefrom for the maintenance and education of the orphan.

While we cannot deny that the Orphans Court in this District has used the summary practice, as shown in the record of the present case, we deny that in the list of cases presented by the defendant's counsel as props on which to support their case, of which the docket entries are printed in the transcript, there is one similar in its essential features to the case now before this Court, and proper to be presented here as a precedent. There is not one in which the guardian's petition misstated the tenure of the property as in this

case, and asked for its sale to relieve the immediate wants of the guardian as well as of the wards; or in which there had been no guardian's account and no estimate of income, or of the requirements of the infants; or in which a trust estate was sold and contingent remainders disposed of, in which neither the time, place, or manner of sale anywhere appears; or in which neither the deed of conveyance nor any part of the record shows any consideration, paid or to be paid, for the property of the infants thus recklessly sacrificed in this lawless proceeding. If such cases cannot be produced, then all the outcry about unsettling titles in this District is utterly vain and idle; but even if such cases could be found, they would only serve to signalize more clearly and to condemn more strongly the great evils of a practice leading to such results.

V.

But it has been urged on the other side with great stress that no matter how erroneous and devoid of jurisdiction the proceedings to divest the infants of their interest in the property in question may have been, yet a series of such errors, committed by the same Court, has invested them with a kind of sanctity as establishing a rule of property, which the Court in General Term and this Court will not disturb.

We respectfully submit that this argument can have no force.

This is the first time the question has ever been brought before this Court, which is constituted by law the highest tribunal to review, by direct line in the jurisprudence of this District, the errors of the subordinate court. There has been no adjudication of the question except by a strictly subordinate court, which can never establish the law for the

higher. If it were otherwise, it would only be necessary, in any case coming here from the courts of this District, to inquire what have been the decisions of the very court whose rulings are brought here for review, which would be an anomaly so egregious as to require no argument to refute it.

Can a Circuit Court of the United States, by any number of its own erroneous decisions, establish as binding upon this Court what this Court shall, in its own higher wisdom and learning, when the question is first brought before it, find not to be the law?

And the Court of this district is, and always has been, in all essentials as related to this Court, a Circuit Court of the United States, with the right of appeal to, and writ of error from, this Court as from and to any other Circuit Court, and whose errors it is the province of this Court to set right. (Acts creating the old Circuit and present Supreme Court of this district, 2 Stat. at Large, 105 and 12 *id.*, 762:)

We admit there are decisions to which this Court will apply the doctrine of *stare decisis*, and these alone can be regarded as establishing a rule of property in the States where made. These are the decisions of the highest courts of the States in the construction of their local statutes or unwritten law.

It is this class of cases which is referred to by Chief-Justice Marshall in delivering the opinion of the Court in McKeen *v.* Delancy's Lessee, 5 Cranch, 22; Polk's Lessee *v.* Wendal, 9 *Id.*, 87; Williams *v.* Peyton, 4 Wheat., 77; Thatcher *v.* Powell, 6 *Id.*, 119, and Elmendorf *v.* Taylor, 10 *Id.*, 152, and which has been adhered to in the many cases collated in the opinion in Leffingwell *v.* Warren, 2 Black., 599.

No decision comes within the letter or spirit of these cases unless it is rendered by the highest court of a given

jurisdiction. This is the highest Court of this jurisdiction, and therefore it is this Court alone which can establish the law as a rule of property.

The only case cited by our opponents in their brief below as an intimation that there is any analogy in this respect between the decisions of the former Circuit Court of this District and those of the State courts is Smith *v.* Black, 115 U. S., 308; but in that case this Court decided the questions involved upon their own merits and its own reasoning, and did not regard the decision of the inferior court as a barrier against its reaching a correct conclusion here as to the law. Its special reference to the decision of the Circuit Court was in regard to a custom in a matter *en pais*, and then, by independent argument, it came to the same conclusion as that of the Circuit Court, viz., that the custom was in consonance with the law, and reversed the judgment of the District Supreme Court for that reason, while if it had recognized any analogy between the binding force upon this Court of a decision of our District Court and of a State court as a rule of property, it should, according to Lettingwell *v.* Warren, 2 Black., 599, have affirmed it as "the latest settled adjudication" of such Court. Had it been a question of the jurisdiction of the very court whose decision was under review, can it be contended for a moment that this Court would have held itself bound by that decision?

Mr. Justice Cox, in his opinion (*Transcript*, p. 64), frankly admits the correctness of our position upon this point, but urges the inconvenience to those who have acquired supposed rights under the proceedings, which we attack, of applying to them the law as this Court may find it to have existed. Such a doctrine would relieve purchasers under judicial proceedings from the maxim *caveat emptor*, would overturn well established principles in the acquisition of

property, violate the Constitution by depriving a citizen of his property without due process of law, and bring in a train of evils in place of the individual case of inconvenience which it was intended to remedy.

We are aware that every court, when called upon to review the decision of another, given after argument and due deliberation, will carefully consider such decision and the grounds upon which it is based; but it appears that the questions now involved were never argued and deliberately decided, even by the courts of this District, until the present case, and now this record presents two contrary decisions of the Court in General Term and two different opinions in their support, the former being in favor of this plaintiff in error, on which judgment was entered (p. 29 of *Transcript*), and which has never been formally vacated, and the latter, at a subsequent term of the court, in favor of the defendant; so that we regard the case now before this Court as one of first impression. With this view it seems to us unnecessary to comment at length upon the instances in which courts of the highest resort, including this, have overruled their own decisions when satisfied that they were wrong, and which have become the subject of a well-known volume of "Overruled Cases." In one such instance (Collender *v.* Insurance Co., 23 Pa. St., 474) the Court, in reversing what was declared to be the ruling in several decisions of the same question, says: "It is a plain error, and it is not our duty to set the stain that mischance has dropped upon the law." In Smith *v.* Doe, 2 Brod. & Bing., on p. 581, Lord Chief-Justice Dallas, in pronouncing upon the validity of a certain lease, where a long-established practice in the profession of the bar and the disasters that would ensue if it were to be decided invalid were strenuously urged upon the court, declared, in giving his opinion to the House of Lords: "If principle and practice are at variance practice must give

way; and in this case, as in others, if the mischief is extensive the proper remedy, if such there be, must be sought for and applied elsewhere." Our opponents, in replying to this citation in their brief below, comment upon the fact that the opinion of Chief-Justice Dallas, holding the lease invalid, was not adopted by the House of Lords, and that Lord Chancellor Eldon was among those who did not concur in that opinion.

This difference of opinion, however, was not as to the propriety of holding to the law, whatever the practice may have been, but simply as to whether the lease was valid or not, as strict matter of law, and Lord Chancellor Eldon, himself, says: "We have to determine, as I understand, upon the validity of a particular lease. * * * The decision upon that lease, however, will not only give validity or invalidity to the lease in question, but, as we have been informed at the bar, to the leases of a very considerable mass of property. * * * But, however great the interest of any of these parties may be, it is most for the public interest that your lordships shall take care to decide rightly." And the opinion of Richardson, J., contains a like expression.

Lord Ch.-J. Denman, in his opinion to the House of Lords in the celebrated case of O'Connell *v.* Reg., 11 Clark and Finnelly, pp. 371 and 373, expresses similar views in the most apposite and cogent language.

It is apparent, from the record, that the alleged purchaser at the alleged sale (Favier), or his legal adviser, did not have confidence in its validity, for while he did not have the deed from Mrs. Thaw recorded until 1867, nineteen years after its execution (*Transcript*, p. 15), and one year after Mrs Thaw's death (p. 7), yet in May, 1848, two months after the execution of the said deed, he, Favier, obtained and had recorded a deed from Columbia Thaw, the sister of the plaintiff, conveying to him her interest in the property

in question (p. 7). It may well be that the conveyance of Mrs. Thaw's interest, alone, more than compensated Favier for what he paid, if anything.

The plaintiff's right of entry and of suit for possession did not accrue till his mother's death in 1866, and that he was guilty of no laches is evinced by the fact that he entered an ejectment suit the same year, which was dismissed by his attorney without his knowledge, and as soon as he learned of such dismissal he instituted the present action (*Transcript*, p. 8). We have shown elsewhere that there is hardly a possibility of another case arising essentially similar to the present one.

But in any and every view of the case, whatever may be the opinion of this Court as to the true construction of the act of 1798, or of the weight to be given to the practice of the Court in this District in respect to the sale of an infant's real estate through a decree of the Orphans Court, it cannot affect the proposition that the proceedings, to be of any validity, must have been begun and prosecuted in the manner prescribed by law, and must show that all the essential requisites to give jurisdiction to the Court were complied with, which we think we have demonstrated was not the fact.

We have not deemed it necessary or advisable to discuss, *seriatim*, the several bills of exception, but rather the general principles involved. Before closing, however, we would call special attention to two of them. The fourth (*Transcript*, pp. 20–21) is to the admission in evidence of a deed of partition between the plaintiff and his sister in 1871, presumably to establish an estoppel against the plaintiff. That this was error cannot be doubted, and is so shown by the opinion of Mr. Justice Hagner (p. 50 of *Transcript*), and

virtually admitted in that of Mr. Justice Cox (p. 73), who says the deed "was in no sense an estoppel."

The sixth bill of exceptions (*Transcript*, p. 23) is to the granting of each of the two prayers of the defendant, and *also* to the instruction of the court, *sua sponte*, to the jury to find a verdict for the defendant (*Transcript*, pp. 23–24). The first of these prayers contains two important "if's," which involve the finding of facts by the jury, and, besides, it includes the assertion of an estoppel by the above-mentioned deed of partition; while the second prayer makes the recitals in Mrs. Thaw's deed to Favier, evidence of the facts recited, "*if* the said deed was accompanied or followed by the possession of said Agricol Favier and those claiming under him;" but the court, after granting these prayers, added the instruction to the jury to find a verdict for the defendant, thus taking from the jury not only the finding of facts involved in these prayers, but in the whole case. The counsel for the defendant did not, in their brief at the hearing below, make any objection to the form of this bill of exceptions, but Mr. Justice Cox, in his opinion, raises a technical objection to it, and says, speaking for the court, "We are not bound to notice this exception" (*Transcript*, p. 73). We are at a loss to understand what is lacking, either in substance or in form, to entitle it to notice and consideration. The learned Justice says it does not appear whether the exception was to the statement of the court as to there being no disagreement as to the facts, &c., or to the instruction to find for the defendant, but a reference to the bill of exceptions itself makes this very clear. It explicitly states that the plaintiff objected to each of the defendant's prayers, "but the court overruled the objection and granted the same," * * * "and the court *instructed* the jury to find a verdict for the defendant; to which *said instruction* the plaintiff *also* objected, but the court overruled the ob-

jection." This exception covers all the previous ones as to the admission of the specific items of evidence offered by the defendant, and, beyond that, it includes the taking from the jury the determination of questions of fact, and involves the merits of the whole case. We therefore respectfully submit that it was entitled to notice by the General Term, and ask its due consideration here.

F. P. STANTON,
S. R. BOND,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1889.

No. 264.

COLUMBUS THAW, *Plaintiff in Error*

vs.

HEIRS OF MARIA RITCHIE, *Defendants in Error.*

Brief and Argument of George F. Appleby, Esq., for Moore Falls and Jennie M. Rich, heirs of Maria Ritchie, deceased, defendants in error.

GEORGE F. APPLEBY,
For Heirs of Maria Ritchie.

R. O. Polkinhorn, Printer, 632 and 634 D Street.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

COLUMBUS THAW,
Plaintiff in Error,

vs.

MARIA RITCHIE.

No. 264.

Statement.

This is an action of ejectment brought by the plaintiff in error on December 12th, 1882, against the above named defendant, Maria Ritchie to recover an undivided moiety of part of lots 1 and 4 in square 160, Washington, D. C. The general issue was pleaded. Pending these proceedings in error, the said defendant in error died and her representatives have been substituted in her stead in this court.

The case was tried before a jury in March, 1885. There were no controverted facts, and the jury under the instructions of Chief Justice Cartter, who presided at the trial, returned a verdict for the defendant. To the rulings of the court during the progress of the trial six exceptions were taken by the plaintiff, and upon his six bills of exceptions a mo-

tion for a new trial was made which, as required by law, was heard in the General Term in the first instance. It so happened that only two justices out of the six composing the court were on the bench in General Term and under the law they constituted a quorum. These were Justices Hagner and James, (4 Mackey, 347,) and they heard arguments, and on January 25th, 1886, passed an order granting a new trial—Mr. Justice Hagner delivering the opinion of the two judges, and thereupon, on January 28th, 1886, the defendant filed a motion for a re-argument of the case before a full bench, in General Term, which motion was on February 15th, 1886, granted by the court in General Term, Mr. Justice Hagner concurring therein (Pr. Rec., p. 32). The full bench, consisting of Justices MacArthur, Cox, Hagner, James, and Merrick (5 Mackey, 200), heard the re-argument, and on October 11th, 1886, the motion for a new trial was overruled. Judge Hagner dissented. Judge James it will be thus seen, assisted the court in reversing himself. Judge Cox delivered the opinion of the Court, which occupies about 26 pages of 5th Mackey Reps., from pp. 201 to 228, and this opinion is in the printed record of this court from page 55 to page 73. The print in 5th Mackey is more legible. The record shows, pp. 31 and 52, that Judge Wylie, in equity suit No. 6930, brought by *Columbia Thaw Little* against *Ebon C. Ingersoll*, sustained the validity of the defendant's title. It, therefore, appears that the title of the defendant to this property is deemed by six judges of the court below to be good and indefeasible and that Mr. Justice Hagner is the only Judge of that court who thinks otherwise, and he concedes that the testimony adduced

by defendant was admissible (Pr. Rec., p. 35) under the authority of *Grignon* vs. *Astor*, 2 How., 319, if the Orphan's Court had the power to sell real estate, thus disposing of and overruling the exceptions of the plaintiff touching said testimony; but he denies that the Orphan's Court had the right to sell real estate vested in an infant notwithstanding the plaintiff himself concedes the right of the Orphan's Court to sell such real estate if the infant be possessed thereof (see plffs. 5th bill of exceptions, clause 2 p. 22, Printed Rec.)

It thence follows that if the defendant, Maria Ritchie, showed a good and indefeasible record title in herself to the property sued for, at the trial, she was entitled to a verdict in her favor, and that no errors if any were committed by the court below in the progress of the trial would entitle the plaintiff to a new trial, for any such errors would be harmless errors.

Facts Shown by Plaintiff.

It appears that the plaintiff gave evidence to show that both he and the defendant claimed title through Joseph Thaw as a common source of title (Pr. Rec., p. 7) under the will of Jospeh Thaw, which will he produced in evidence (pp. 6 and 7); that Joseph Thaw was plaintiff's father, and died in 1840, seized of the real estate in controversy, and left surviving him a widow, Eliza V. Thaw, who was his second wife, and two children by her, the plaintiff, born in 1831, and the plaintiff's sister, Columbia Thaw, older than himself, since intermarried with one John Little, and other children, by his first wife, and that the will dated

February 26, 1840, was probated in 1840 (Rec., p. 6); that besides lots 1 and 4, in square 160, plaintiff's father left homestead property on New York avenue (Pr. Rec., p. 21), the same being lot 2 in square 251, which was sold by the mother (Pr. Rec., p. 21), who, out of the proceeds of sale, purchased two parcels of land for $1,000 each (p. 21), and that the deed of each piece was made to the mother as grantee (p. 22); that plaintiff's mother would not make an assertion that was not true (p. 21); that plaintiff lived in Washington all his life, and lived with his mother from the death of his father until her death (Pr. Rec., p. 8), and that she died in February, 1866 (Rec., p. 7); that he has never paid any taxes on this property in suit (Rec., p. 8); that it is unimproved; that his sister, Columbia Thaw, conveyed her interest in this property to Agricol Favier by deed dated May 16th, 1848 (Pr. Rec., p. 7); that on September 8th, 1866, he and his sister Columbia brought an ejectment against the heirs of Argricol Favier for this property; that shortly after that ejectment was instituted, Mr. Walter S. Cox, trustee, showed him a deed made by plaintiff's mother (Rec., p. 8); that Mr. Cox was trustee in equity proceedings for partition of estate of Agricol Favier, deceased (Rec., p. 7). It appears that this deed was recorded March 7th, 1867 (Rec., p. 15), and that the ejectment was dismissed March 18th, 1867 (Rec., p. 8).

Plaintiff further produced evidence to show that in the deed of partition between plaintiff and his sister, dated March 1st, 1871, and recorded among the land records of the District of Columbia on May 2d, 1871, containing the following recitals, to wit:

"Whereas Joseph Thaw, late of said city, by his last will and testament, bearing date on or about the twenty-sixth day of February, A. D. 1840, and duly admitted to probate, did bequeath and devise as follows, to wit:

"Item. I give and bequeath to my two children, Columbus and Columbia, in equal parts, to their heirs and assigns forever, all my estate, real and personal, that shall remain at and after the death of their mother; or if either of them shall (not) survive their mother, then I will that the survivor shall have the whole.

"And whereas their said mother, after disposing of the real estate acquired by said will and investing the proceeds thereof in other real estate, more particularly described hereafter, died intestate, leaving the said devisees Columbus Thaw and Columbia Little her sole heirs-at-law"

it was the New York Avenue property alone which was referred to, as having been disposed of by his mother, and it was shown by the record that the deeds to the mother of the two pieces of property purchased as alleged out of the proceeds of sale of the homestead conveyed the identical two pieces embraced by the partition deed, of which one by the partition went to Columbus and the other to Columbia.

It does not appear that Joseph Thaw left any personalty.

a

Argument on case as shown by plaintiff.

It thus appears from the plaintiff's own showing that Joseph Thaw had at the time of his death the property in dispute in addition to the homestead;

that the homestead was sold by his widow under the will in 1850, during plaintiff's minority; that she purchased other real estate with the proceeds of such sale; that plaintiff, after his mother's death, took the substituted real estate as her heir-at-law, having at the time full knowledge of the fact that his mother had also sold the property now in dispute and had executed a deed therefor. This shows that in the family the children accorded to the mother a power of sale under the will, and that the mother exercised the same in their behalf. It also shows, if the partition deed be confined in its meaning to the homestead property sold by the mother that the vacant lots now in dispute and sold by her were not invested in other real estate and that the same constituted only a part of the real estate of the testator. Does this family interpretation of the will accord with the canons of construction laid down by the courts? We answer that it does, and that this court ought to hold that the will of Joseph Thaw vested in his widow power to sell the real estate thereby devised so as to divest, when exercised, the children's interests under the will.

1. This answer by us, to the question by us put, is not repugnant to the position of this court, in several cases, in which the power of disposition was held to be confined to the life estate, since the real estate was expressly given to the widow to hold and enjoy during her natural life, etc., because in those cases to have held otherwise would violate the intent of the testator, but in this case the exercise of a power beyond the life estate will effectuate the testator's intent.

It is plain that Joseph Thaw's will is a layman's production, and, where technical limitations are used, they are not to be construed in a technical sense if, by other portions of the will the testator shows that he did not know their technical meaning. In one item Joseph Thaw says: "If both of the said children shall die before their mother, my said wife, then she, my said wife Eliza, shall *hold* the said property during her natural life for her own sole use and benefit, and in no case shall she, my beloved wife Eliza, he deprived of the use of any part thereof during her natural life for the maintenance * * * * of herself while she shall survive them both, and then in a subsequent item, he says: "If both of my said childen shall die before their mother then in the demise of the last survivor of them, I give and bequeath to my beloved wife Eliza, to her heirs and assigns forever, for her own proper benefit, all my estate of every description." (Printed Rec., p. 6.) He thus gives his wife in a certain event a fee simple estate, notwithstanding her tenure thereof is expressed to be for her natural life. It follows that he did not know the use of the *habendum* in the sense of limitating an estate. His idea of holding was very different from a lawyer's. His wife was to hold the property. His children were not to hold it. She was to *hold* for the benefit of herself and the two children for her lifetime whether or not the children were of age, and yet if one should die before reaching full age, she was "to hold the *whole* property" for the equal benefit of herself and the survivor. To his two children he did not devise the whole of his real estate but only *what remained thereof* at the death of their mother. She may have

died during their minority. Joseph Thaw had unlimited confidence in his wife. He authorized her to act as executrix without security. She and her children were the only objects of his bounty, while other children by a former wife were entirely excluded. As the younger of her children was nine years of age, the children by the former marriage may have been grown and must have been old enough to take care of themselves. The testator, besides the family dwelling house, had only two vacant lots, which of course produced no income and were only a burden, as taxes had to be paid on them. The evidence introduced by defendant shows that the testator was in debt and that after the payment of these debts by his widow, she was in want and that she could not support and educate the children because the estate left by the testator was insufficient for the purposes: and that she wished to sell the vacant lots for this purpose (Pr. Rec., pp. 8-9). These extrinsic circumstances seem to cast a reflex light upon the will and to leave no doubt that the testator contemplated that a sale of the property might become necessary for the purposes of support and maintenance, and that he intended that his wife should have the power to provide food and raiment for her infants and herself. Indeed the primary object of the testator, as appears from the will itself, was to provide for the maintenance and support of these special objects of his bounty, and the power in the wife to dispose of the property for that purpose might well be implied in order to carry out the cardinal intent of the testator, but in the very first item of the will he declares that his beloved wife Eliza Von Tyler Thaw shall act in trust for his two youngest

children, to wit, his daughter Columbia Thaw and his son Columbus Thaw, in *all* things as fully as he would do if living, and in the second item he designates the trusts, and in the third item he gives and bequeaths to his two children Columbus and Columbia, in equal parts (tenancy in common and not joint tenancy as claimed by plaintiff) all his estate real and personal that shall remain at and after the death of their mother, his said wife Eliza.

Clark vs. *Boorman's Executors*, 18 *Wallace*, 502–503.

Second Reformed Presbyterian Church vs. *Disbrow*, 52 *Penn. St.*, 219.

Paine vs. *Barnes*, 100 Mass., p. 471.

Shaw vs. *Hussey*, 41 Me., 495.

"It may be well doubted, (says Justice MILLER, in *Clark* vs. *Boorman's executors*, 18 Wall., 502, 503); if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution and connecting the parties and the property devised with the testator and with the instrument itself."

In the *Second Reformed Presbyterian Church* vs. *Disbrow*, the court held that, a devise to testator's wife "to have, and to hold and enjoy during her lifetime and dispose of the same as shall seem best unto her, and in doing so she shall possess all the rights and powers that I, of right, could do if living, 'but it is my wish that my said wife will leave at her death the property, or any part that may

then remain, &c.,' give the wife a power of disposition as absolute as that possessed by the testator; and it was also held that the words "any part remaining" implied that part of the devise might be so used as not to be in existence at her death.

In *Paine* vs. *Barnes*, 100 Mass., p. 471, where the testator gave his wife all his real and personal estate for her support and benefit during her natural life, and after his wife's death, if anything of said estate should remain, he gave it over to third persons, the court said:

> "The court are of opinion that the language of the devise to the wife can only be construed as giving her an estate for life, with a contingent power of disposition of the remainder only in case of it being needed for her support. The fact that there is a remainder devised over, after the estate for life to her, shows that it could not be intended to give her a fee, and that the purpose for which the estate is given, can only at the most imply a power of disposal if the exigency should arise. Perhaps, upon the authorities, the use of the phrase, "if anything should remain, in connection with the devise of a remainder of real estate after an estate for life, would imply a power to convey; as otherwise, there could be no reason for the doubt whether the estate should remain."

To the same effect, and stronger in some particulars, is the case of *Shaw* vs. *Hussey*, 41 Me., 495.

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2. Whether the will gave, as is now contended on behalf of the plaintiff, an estate for life to the widow and a remainder in fee to her children, or whether the widow and her children had a joint estate during

their lives (see 9 Jacob's, Fisher's Digest, 13,986 and cases there given) the power of disposition over the estate, which defendant's counsel claims the widow possessed, when exercised, as she did exercise it, overreached and divested all the estate of the plaintiff in the lots in suit. See. 4 Strobt. Eq. 66.

b

Facts shown by Defendant.

Heretofore we have presented to the court only the evidence adduced by the plaintiff. It further appears by the record from the defendant's evidence that the testator's widow, assuming that she had the right to sell said vacant lots under the will of her husband, went to Agricol Favier, who owned and lived upon that part of square 160 west of lots 1 and 4, of which Joseph Thaw died seized and possessed, and urged him to purchase the lots from her, but he did not want them; that Mr. Redin was Agricol Favier's legal adviser; that the widow afterwards went to Favier with a boy and girl, the girl being taller than the boy; that she begged Favier to buy; that she looked to be in need; that Favier told her he would buy if she got a decree of court (Printed Rec., 14); that she as guardian to Columbia Thaw and Columbus Thaw, orphans of Joseph Thaw, gave bond March 22nd, 1844, in the sum of $725, with Henry Walker and John Walker as sureties, which bond was filed in the office of the Register of Wills of the District of Columbia; that having given such bond she on the 29th of March, 1844, filed a petition in the Orphan's Court of Washington County ad-

dressed to the Hon. N. P. Causin, Judge of the Orphan's Court, which represented that she had paid all the debts due by her deceased husband Joseph Thaw, and that the property left by the deceased was insufficient to support her and the children provided for in his will; that a portion of the estate consisted of two vacant and unimproved lots of ground in Washington city, being lots 1 and 4 in square 160, and prayed the court for an order to sell said lots so that her wants might be relieved and the children named in the bill might be supported and educated; that this petition was sworn to on 29th March, 1844, before Henry Naylor, a justice of the peace; that with this petition were certain exhibits and accompanying proofs, as recited in the order of the Orphan's Court made the same day, and now missing; that at the same time the said widow made certain representations to the court not only in her capacity as guardian to the children, but also in her capacity as executrix of the will of her husband, as is recited in the order of the court; that thereupon the Orphan's Court passed an order on the 29th day of March, 1844, as was usual in similar cases from its organization, for the sale of the real estate, which order entitled "In the case of the petition of Eliza V. Thaw, executrix of and guardian to Columbia and Columbus Thaw, minor children of Joseph Thaw, deceased," is as follows:

> "This case coming on to be heard in the orphans' court on the petition, exhibits, accompanying proofs and representation of said Eliza V. Thaw, in her capacity as guardian and executrix aforesaid, the same were by the court read and duly considered, and therefore, it is by

the said court, this 29th day of March, 1844, ordered, adjudged and decreed, provided that the circuit court of the District of Columbia for the County of Washington, sitting as a court of Chancery, shall, by its proper order in the premises, approve thereof, that the said guardian petitioner for the minor children of said Joseph Thaw and herself, be, and she is hereby, authorized and empowered to sell the said real estate mentioned in said petition at public or private sale, after such notice by advertisement as she shall deem reasonable and sufficient, on the following terms, viz., either for cash or a credit, at the option of the said guardian, and on the full payment of the purchase money and interest, and on the ratification of the sale by this court, to execute to the purchaser, his heirs or assigns, at his or their costs and request, a valid and sufficient deed of conveyance in fee simple of the said premises, with all the right and estate therein of the said Columbia and Columbus Thaw, minor children aforesaid, provided that the said guardian, before proceeding to act hereunder, shall file with the register of wills her bond, with security, to be approved by the judge of this court in the penalty of seven hundred and fifty dollars, with the usual condition for the due and faithful performance of the trusts reposed in her as guardian of said children, and immediately after making said sale to report the same under oath to this court."

(Signed) NATH'L POPE CAUSIN.

That upon the obtaining of this order from the Orphan's Court she filed a petition in the late Circuit Court, sitting as a Chancery Court, with an exhibit thereto, the same being certified copy of the petition in Orphan's Court and order thereon of Orphan's Court, certified to under date of April 29th,

1844, by Edw'n N. Roach, Register of Wills, her petition in chancery, being No. 344 of Chancery Rules No. 4, and through Carlisle, solicitor, (the late James M. Carlisle) obtained on October 12th, 1844, a decree in chancery approving or affirming the decree or order of the Orphan's Court, and on May 17th, 1845, gave bond of that date, with Henry Walker and John Walker as sureties, in the penalty of $750, as prescribed by the order, with the usual conditions, and the same was filed in the office of the Register of Wills, and an entry made in Guardian's Docket No. 2, case No. 646, which entry indicates that the court approved the bond, as recited in the guardian's deed ; that she thereupon sold the real estate and reported the same to the Orphan's Court on Friday, January 21st, 1848, and the court approved the same; that on the 17th day of March, 1848, she made a deed of that date, acknowledged on that day before two justices of the peace, reciting that a decree was passed March 29th, 1844, by the Orphan's Oourt for the County of Washington, D. C., upon the petition of Eliza V. Thaw, guardian of her infant children Columbus and Columbia Thaw, whereby she was empowered to sell lots 1 and 4 in square 160, in Washington city, D. C. ; that said decree was confirmed by the Circuit Court of Washington County, sitting as a Court of Chancery ; that in conformity with said decree she filed a bond, with sureties, which was approved by the Orphan's Court, and that in like conformity with said decree she sold the said lots to Agricol Favier, and reported the sale to said court, which court on the 21st day of January, 1848, duly approved, ratified and confirmed the said report, and by said deed she granted, bargained, sold,

aliened, enfeoffed and confirmed to Agricol Favier, his heirs and assigns, the said two lots 1 and 4 in square 160, and all the estate, right, title, interest, claim and demand whatsoever, legal and equitable, of her, the said Eliza V. Thaw, as guardian and trustee, as well in her own right as of the infant children Columbus and Columbia; to have and to hold the same to him, his heirs and assigns, to and for his and their use; and further covenanted that she and her heirs and assigns would at the request of the said Favier, his heirs or assigns, do any further act the better to convey the said premises to him which he or they shall or may require (printed record, pp. 15 and 16); that the purchaser went into possession of the property and expended a good deal of money on the lots, enclosing the same with a fence, and building thereon a stable and gardener's house, putting a pump on it, and planting cherry trees on it, and that it continued to be enclosed up to the time the government took possession of it during the war of the rebellion; that Favier paid taxes on it during his lifetime, and his heirs afterwards; that the government paid rent for it and occupied it for keeping horses there, and that when the troops left all the improvements were gone (Pr. Rec., p. 14); that Favier gave the said deed to him from Eliza V. Thaw to his lawyer Wm. Redin, of Georgetown, to have the same recorded; that Mr. Redin had the care of all his papers; that Favier was a Frenchman, and died in 1854; that after Favier's death his heirs proposed to sell (Pr. Rec., p. 14,) and Mr. Cox (Walter S. Cox) wanted the deed and went to Mrs. Jardine, the oldest child of Favier, and asked her if she had the deed, whereupon she thought that it was at

the City Hall (the Recorder's Office), and being told by Mr. Cox that it was not there, she searched for it for several months, and then told Mr. Cox that it must be among Mr. Redin's papers; she had seen the deed given by her father to Mr. Redin (Rec., p. 14); that Mr. Redin being dead, Mr. Wm. R. Woodward, his son-in-law, searched among the papers of Mr. Redin and found an unrecorded deed from Thaw, which was Favier's, and the same was given to Mr. Cox, who asked for it (Pr. Rec., p. 13); that plaintiff was shown the deed by Mr. Cox, and that plaintiff recognized it as his mother's deed, which was shortly after plaintiff's ejectment, which was instituted September, 1866, and dismissed March 18th, 1867, (Pr. Rec., 8); and plaintiff testified that his mother never made an assertion which was not true (Rec., p. 21,) and the deed was recorded March 7th, 1867 (Pr. Rec., p. 15); that Favier always claimed the property as his own after his purchase, and that Favier's heirs claimed it as their property until it was sold to Mr. E. C. Ingersoll (Pr. Rec., p. 14); and that it was sold to Eben C. Ingersoll for $8,516, and conveyed to him in fee simple by Walter S. Cox, trustee in Equity, No. 1253, *Jardine* vs. *Favier, et al*; that Ingersoll sold to Mary France for $9,021.47, and gave deed purporting to convey in fee simple; and Mary France devised the same in fee simple to the defendant Maria Ritchie, and that the said defendant paid about $1,900 in special taxes, and that the property is worth $12,000; and it further appears by the defendant's evidence that in numerous cases both before and after the chancery cause No. 344, Rules 4, in which the Chancery Court gave its approbation to the sale under the order of the Orphan's Court of

the property in question by the plaintiff's guardian, the practice and proceedings were the same as in said cause No. 344; that the proceedings were conducted by the most eminent lawyers at the District of Columbia bar; that the practice arose under the Maryland act of 1798, Chap. CI., sub-Chap. 12, Sec. 10; and that it is the only proper proceeding in cases where the sale of a part of an infant's realty is necessary for his maintenance and education.

Many of the cases showing the practice were read in evidence and are shown in the appendix. This proof was submitted and admitted under the authority of *McKeen* vs. *DeLancey*, 5 Cr., 22–28, 29–32, 35. The appendix does not contain the early cases or all the cases.

The Maryland act of 1798, as usually cited, is sometimes called the testamentary code of that State. Although called the act of 1798, because it was enacted in the November session of the legislative assembly of the year 1798, it was not actually passed until January 20th, 1799, and did not go into effect until June, 1799, and was in force on February 27th, 1801, when Congress by its act of that date (Vol. 2, pp. 104 and 105) continued in force all the laws of Maryland then existing, and even went so far as to extend the said testamentary law to that part of the District ceded by Virginia, for, by Section 12 of the said act of Congress, Judges of Orphan's Courts and registers of wills are to be appointed for both counties—the county of Washington and the county of Alexandria, and are to have all the powers and perform all the duties which are execised and performed by the judges of the Orphan's Courts and register of wills within the State of Maryland. The said act of

1798 was prepared at the request of the legislature, by Alexander Contee Hanson, Chancellor of Maryland.

The sections of the Maryland act, which will probably be discussed in the argument, are here subjoined for the convenience of the court.

CHAP. 101, SUB-CHAP. 12, SEC. 7 to 16, inclusive
LAWS OF MARYLAND, 1798.

"7. No guardian shall commit waste on the land, but the court may, on his application, allow him to cut down and sell wood, and account for the same, in case it shall deem the same advantageous or necessary for the ward's education and maintenance.

"8. And each guardian having a real estate under his care, shall either cultivate the same, with the slaves, stock and utensils belonging to the ward, or to be purchased with his or her money, with the approbation of the court, or he shall lease the same from year to year, or for any term not exceeding three years, and within the non-age of the ward; or he may, with the court's approbation, undertake the estate on his own account, and be answerable for the annual value, such annual value to be every third year ascertained, under the direction of the court.

"9. Every guardian shall account for all profit and increase of the estate, or annual value as aforesaid, and shall not be answerable for any loss or decrease sustained without his fault, to be allowed by the Orphan's Court.

"10. And once in each year, or oftener if required, a guardian shall settle an account of his trust with the Orphan's Court; and the said court shall ascertain, at discretion, the amount of the sum to be annually expended in the maintenance and education of the orphan, regard be-

ing had to the future situation, prospects and destination, of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate, and to make use of his principal, and to sell part of the same, under its order; provided nevertheless, that no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the court of chancery, or general court, as well as of the Orphan's Court.

"11. And on the first account to be rendered by a guardian, he shall state the property by him received from an executor or administrator, or otherwise belonging to his ward, and every increase, and the profits thence arising, if any.

"12. In case the personal property of a ward shall consist of specific articles, such as slaves, working beasts, animals of any kind, stock, furniture, plate, books, and so forth, the court, if it shall deem it advantageous for the ward, may at any time pass an order for the sale thereof for ready money, or on credit, the purchaser, with security, giving bond to the said ward, bearing interest; and all proceedings relative to such sale shall be as herein directed with respect to sales by executors or administrators.

"13. Every account of a guardian shall state his expenditures in maintaining and educating the ward, not exceeding the income of the estate, unless allowed by the court; and for no balance of money in his hands shall he be charged interest, unless he shall consent to take the same on interest, but the court may direct him to place the same at interest, taking bond to the orphan, with security approved by the court; and for the trouble and care of such guardian, the court may allow any commission, not exceeding ten *per cent.*

"14. On a guardian's failing to account as herein directed, his bond shall be liable to be put in suit, and he shall also be liable to attachment and fine as aforesaid, but he shall not be liable to any fine in a court of law, any act to the contrary notwithstanding.

"15. On the ward's arrival at age as aforesaid the guardian shall exhibit a final account to the Orphans' Court, and shall deliver up, agreeably to the court's order, to the said ward, or the husband (as the case may require), all the property of such ward in his hands, including bonds and other securities, and on failure his office bond shall be liable, and he shall also be liable to attachment and fine as aforesaid.

"16. Nothing in this act contained shall be construed to affect the general superintending power exercised by the Court of Chancery with respect to trust."

ARGUMENT ON SECTION 10 OF SUB CHAP. 12 OF THE ACT OF MARYLAND, OF 1798, CHAPTER 101.

Did the Act of Maryland 1798, Chap. C. I. sub. chap. 12, Sec. 10, cited *supra*, authorize the sale of a part of an infant's real estate for the infant's maintenance and education by its guardian under the order of the Orphan's Court and with the approbation of the Chancery Court? And is the practice, which has so long prevailed in this district in respect of such sales, founded upon reason or supported by authority? And should that practice be now sustained as to past transactions?

In 1799, when the said Maryland testamentary law was passed, the Court of Chancery did not have in England, and was not considered to have in Mary-

land, any inherent power to bind, dispose of, or to transmute into personalty an infant's inheritance. Whenever such relief was needed the *Legislature* was appealed to to pass a *private bill*. It was considered a *Legislative* authority long before the date of the Declaration of Independence (since which time the Legislature is deemed to be *parens patriæ* instead of the King). This is shown by the case of *Taylor* vs. *Phillips*, (2 Ves., Sr.,) where Lord Hardwicke says:

> "There is no instance of this court's (Chancery Court's) binding the inheritance of an infant by any discretionary act of the court. As to personal things, as the composition of debts, it has been done, but never as to the inheritance, for that would be taking on the court a Legislative authority, doing that which is properly the subject of a private bill."

The Chancery Court could sanction the felling of timber by a guardian on the lands of his ward; and when the books speak of the Chancery Court at that time having power to change realty into personalty, they mean, as appears by the cases cited, a power to allow a guardian to cut timber from his ward's lands. On the 21st of June, 1798 (38 George III., Chap. 60, Sect. 20), the British Parliament passed an act providing for sale by guardian of part of infant's land, upon certificate of two commissioners of county, giving their approbation, provided that nothing in the said act contained should be construed to extend to empowering any heir of entail in possession of entailed estate in Scotland to sell or dispose of any part of the said estate without application to the Court of Sessions by petition, and obtaining the

authority of that court to such sale and to the due application of the money thence arising; and, provided further, that in all cases where the court gives authority the consent of the commissioners is not necessary. In this country, Massachusetts, in 1783, (Chap. 32, Sect, 3,) authorized the guardian to sell the ward's land upon the certificate of a judge of Probate Court and order of the General Court—the guardian accounting to the Probate Court. Other New England States passed similar laws. In *Thurston* vs. *Thurston*, 6 R. I., 296, where the inherent power of equity was invoked for the sale of an infant's realty, the court held that it was beyond the power of the Court of Chancery to decree a sale of infant's lands; that the power, if possessed by any court, was vested by statute in the Probate Court. The Rhode Island statute was passed in January, 1798, upon the report of a committee previously appointed to digest the laws of the State. The Rhode Island act makes provision for a sale by guardian of so much of ward's realty as may be necessary for his maintenance, and makes no ulterior provisions as to mode of such sales.

When the Maryland act of 1798 was pending, an act was pending in the New Jersey Legislature which became law about the same time, providing as follows :

> "That if the personal estate and the rents and profits of the real estate be not sufficient for the maintenance and education of the ward, the Orhhans' Court of the proper county, on full investigation thereof, may, from time to time, order the guardian to sell such parts of the ward's lands, tenements, hereditaments, and real estate as they shall direct and judge adequate for his maintenance and education."

This subject as to the rights and powers of a guardian had been undergoing discussion in the various States since the Declaration of Independence.

Tapping Reeve, who was afterwards chief justice of Connecticut, established in 1784 the celebrated law school at Litchfield, and was the sole instructor until 1798 (when he associated with him James Gould). To his influence has been ascribed the change effected in the laws regarding married women. His book on Domestic Relations, including the chapters on guardian and ward, is composed of his lectures at Litchfield, written before he went on the bench in 1798. He said, in one of his lectures:

> "In case of a power residing in the guardian to convert real into personal property, it would prevent frequent applications to the Legislature to vest the guardian with such power. And why a guardian should not be entrusted to manage the estate of the minor in this way when *he* judges it beneficial to the minor, it is difficult to conceive, since the estate is placed in his hands, and his integrity in this respect is secured by a bond, as well as in all other cases, and he is always liable to the minor for any mismanagement."
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> Chap. 5, Guard. and Ward, *335.

To the same effect is the reasoning of Leigh & Dalzell in their Treatise on Equitable Conversion, [Law Library]. This was the condition of things when Chancellor Hanson of Maryland, who had been invited by the Maryland Legislature to digest and report a code of testamentary law, presented the product of his labors to the Maryland Legislature. He was then Chancellor of the State. He knew that the Chancellor had no authority under any statute

to sell the realty of an infant sole seized, or to sell any part of an infant's realty for his maintenance or education. He saw the narrow policy of the prior legislation of his State, touching an orphan's realty, as such policy has been since described to be in *State* vs. *Spedden*, III. H. & G., 261. He saw the enlightened policy of the legislation of sister States, whose laws were at his service in the Capitol of his State—for the States then promptly and regularly exchanged with one-another their laws in handsomely bound volumes, and exchanged even pending bills. (See Journal of Proceedings of Senate, 1796.) He had, doubtless, read the treatises of Jeremy Bentham, then widely read, condemning the insularity of prevailing British law doctrines, and exciting to measures of reform whilst instructing in the methods of amendment, digesting and codification. He knew that the legislature had been beseiged at every session by petitions for the passage of private acts enabling the realty of infants to be sold. He knew that these petitions arose from the inadequacy of the law; that they consumed much time of the legislators—too much time of the then brief sessions, that the power exercised was ministerial, and might be delegated to a town council as well as to a judicial tribunal, and more properly to laymen, interested and exercised in business ventures and the practical affairs of daily life, than to learned judges unused, as a rule, to business, and whose learning could not be essential to such functions. He had already compiled the laws of Maryland up to 1784. He saw the inadequacy of the legislation of 1785. Among the petitions, after the act of 1785, he doubtless saw that of William Wirt, on

Dec. 27th, 1791, to obtain a sale of a part of the real estate of the said Wirt, his personalty being exhausted, and the annual value of the realty being insufficient to enable him to pursue his studies in law, upon which the legislature enacted that the land be sold and the proceeds of sale be applied to his maintenance and education. The Chancellor was preparing a code of testamentary law, and not a compilation of existing law in which he was already an adept. His State, in inviting him to do this, was following in the wake of Rhode Island. He had to study the decisions of the ecclesiastical courts and the principles of the civil law by which they were governed, in order to understand thoroughly the testamentary system of the parent country. He knew, therefore, that the Prætor at Rome and the Præsides in the Provinces exercised a general control over all guardians, and exercised a general superintending power over the persons and property of minors whoever might be their guardians; that they gave directions as to the maintenance of minors and entertained jurisdiction respecting the management of their estates; that if it became necessary to sell immovables, or, as we say, real estate, it had to be done by the authority first obtained of the Prætor, if at Rome, or of the Præses of the province, if in a province, and that it was in the power of the Prætor, or of the Præses, as the case might be, to direct the guardian to mortgage or sell the land, whichever might be more beneficial to the minor—their jurisdiction in these cases being *extra ordinem*, *i. e.*, extraordinary, as contra-distinguished from ordinary, or, as we say, common law jurisdiction. He saw that this jurisdiction was given to the Prætor, not

because it was considered a judicial power, not because the consul could not exercise the power (for it to that extent was only a ministerial power), but because the ulterior power of compelling and adjusting an account of the trust respecting the purchase money, and of the proper distribution thereof, partook of judicial authority, which the consul did not possess, but which the Prætor and Præsides possessed to the fullest extent. He saw that the Prætor and Præsides, under their ordinary jurisdiction, could effectually secure the due appointment of guardians, or, as they are called, tutors: and that in towns where the property of the minor was small in amount this power of appointing guardians had been delegated to the municipal magistrates, to which might be attributable the origin of the custom of London, where the Aldermen used to hold orphans' court.

[In several of the States of the Union the corporation or mayor of town or the town council appoint guardians. Is this a remnant of the custom of London, or is it because the *legislature* is to be regarded as *parens patriæ*, instead of the king or his delegate, the chancellor? The doctrine that the king is the fountain of justice—and is *parens patriæ*—and that consequently the executive of a State, as his successor is such, was regarded by Jeremy Bentham as sapping the liberties of a free State.]

In the light of this history of the law, Chancellor Hanson prepares his code; and the "general history of law and legislation at the time of making a statute is the very lock and key to set open the windows of the statute," and as we "may look chiefly at the

preamble, as stating the ground and cause of making the statute, and as being a key to open the minds of the makers of the act and the mischief which they intended to redress," we find, upon looking at the preamble to this testamentary law, which is entitled "An act for *amending* and reducing into system the laws and regulations concerning last wills and testaments, the duties of executors, adminstrators and guardians, and the rights of orphans and other representatives of deceased persons," that this preamble recites that the prior laws and regulations have been found by experience to be *greatly inadequate* to the purposes for which they were formed. It is further enacted that the judges of the orphan's court must be men of integrity and judgement and believers in the Christian religion; that they are appointed and commissioned, among other things, for the purpose of securing the rights of orphans relative to the affairs of deceased persons according to law. They are given, it is seen, the Prætor's ordinary and extraordinary jurisdiction, and they have the summary and plenary proceedings of the ecclesiastical courts. In order that this ample authority, expressly given, although not to be stretched under pretext of incidental power or constructive authority, might not be construed as repealing, abridging or excluding jurisdiction of the chancery court in certain cases, it is further stated that nothing in the act contained shall be construed as affecting the general superintending power exercised by the court of chancery with respect to trust.

It does not require any argument to show that the policy of this law touching the rights of orphans is antagonistic to the policy of prior legislation. The

rights of orphans neccessarily imply a duty or duties on the part of others. For instance, to use the language of Chancellor Bland (3 Bl., 204), "it is the duty of the State to protect all her citizens, but more especially the infants, for whom she is bound to provide maintenance and education in case they should be without parents or pecuniary means." The orphan without pecuniary means has a right, therefore, to such protection. If he have sufficient pecuniary means he has a right to have them applied to his maintenance and education, and if his means be not sufficient for the purpose, he has a right to have them diminished for that purpose so as to claim the State's protection. Otherwise, the pauper-born orphan would be entitled to protection from the State, and one with a small and insufficient patrimony would not be so entitled. This right to diminish is recognized in the Digests, as is shown by this passage from Ulpian: "*Totum autem jus consistit aut in acquirendo, aut in conservando aut in minuendo.*"

We are told by Lord Coke (172 a Co. Litt.) that "an infant may bind *himselfe* to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit *himselfe* afterwards;" and Chancellor Bland says:

> "Nor can any law which goes no further than to provide for the application of an infant's estate to his maintenance and education be regarded as, in any respect, a violation of such infant's right of property. An infant is, in general, incompetent to contract; but he may, by contract, bind himself for his maintenance and education, and hence a legislative enactment, which facilitates such an application of

his estates, co-operates with the infant's legally qualified *right* to contract, in discharge of a *duty* to himself, without trenching upon any of his rights." (3 Bl., 205.)

In this testamentary law Chancellor Hanson has made provisions by which the orphan's right *in acquirendo, in conservando* and *in minuendo* are secured. As the corpus or quantity of an orphan's real estate can be diminished in but two ways, to wit, by waste or by sale of part, it is provided in Section 7, sub. chap. 12, that no guardian shall commit waste on the land, but the court (the Orphan's Court) may, on his application, allow him to cut down and sell wood and account for the same in case *it shall deem the same advantageous or necessary for the ward's education and maintenance* ; and in Section 10, sub. chap. 12, that once in each year, or oftener if required, a guardian shall settle an account of his trusts with the Orphan's Court, and the said court shall ascertain, at discretion, the amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects, and destination of the ward ; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate and to make use of his *principal* and to sell *part of the same under its order* ; provided, nevertheless, that no part of the *real estate* shall, on account of such maintenance or education, be diminished without the approbation of the Court of Chancery or General Court, as well as *of the Orphans' Court.*

It is seen that the orphan's right to diminish his capital, his *jus in minuendo*, is clearly recognized

in this statute and allowed in the two ways above mentioned. The sole restriction to this right respects waste, which is confined to wood land. It is difficult to divine why provision was not made for the sale of the entire realty of the orphan, if necessary for his maintenance and education, as well as for the sale of a part. It may be that, as by the constitution of Maryland, then in force, the holding of real estate was a necessary qualification to the filling of certain offices, and that as an infant thoroughly educated might possess at manhood the very qualities, abilities, learning and knowledge fitting him for the holding of such offices, it was thought unseemly to let his manhood come to him bereft of a qualification which he had as an infant, and for this reason, especially as very little realty was required to qualify a man to be the holder of any office, a part of the orphan's real estate was to remain unsold so as to be delivered to him on his arrival at age. Such a reason prompted at common law the issuance of an *ad quod damnum* writ against the alienations in mortmain; but it may not avail in this case, because the object of the statute is to secure not the rights of any one possessing manhood but the rights of the orphan.

As the property involved in the present controversy was a part only of the orphan's real estate, and was of little value compared with the real estate unsold, it is not necessary to trouble ourselves now about finding a reason why the Legislature did not apply the whole of the realty, if necessary, to the orphan's maintenance and education; for it is very clear to us that it did, in words very express

and sufficiently apt for the purpose, apply a part of the realty.

Upon recurring to these words of the statute, cited *supra*, it will be seen that the diminution by waste, *i.e.* by the felling of timber, is accomplished simply by the authority of *one* court, and that is the *Orphans' Court*. Before this act, the Court of Chancery was applied to for such authority (3 Bl., 191.) The Orphan's Court acts only on the application of the guardian, and by section 2 of same sub. chap., the Orphans' Court has power to call or to have brought before it any orphan devisee for the purpose of appointing a guardian for such orphan. The orphan's right is thus always exercised through a guardian even though he be above fourteen years of age; and if a male, until twenty-one years of age, or if a female, until the age of sixteen or marriage. If the widow commit waste in the lands of the deceased she is liable to an action by the guardian of the infant devisee, (sub. chap. 13 sect. 6.) The Orphan's Court allows the guardian to cut wood, and no formal order is requisite. The viewers or appraisers of the real estate are required by section 6, sub. chap. 12, to appraise its annual value and to certify what proportion is woodland. They are not required to appraise the value of the estate itself or of the wood that the Court might allow to be felled for the purpose of sale. The guardian is to cultivate the land, or to lease it, or be answerable for the annual value, (sec. 8, sub. chap. 12.) He cannot cultivate timber land. He may not be able to lease it, and should not therefore be answerable for any annual value, if such value it can have or be supposed to have. It is thus seen that the guardian's bond

may not be sufficient in amount to cover the value of timber which the Orphan's Court may allow him to cut and sell, and for the proceeds of which sale he is accountable; but section 5 of same sub. chapter provides that the Court shall have power to call on any guardian for new security, and on failure may appoint a new guardian. The guardian, under this law, it is thus seen, combines somewhat the powers and duties of both guardianship in chivalry and guardianship in socage. He is the infant's arm, and voice, and brain: especially so, as in the case at bar, where the guardian has been appointed by a last will and testament, and has given bond to the Orphan's Court to prevent the appointment of a new guardian, pursuant to section 3 of said sub. chapter. The orphan's rights are resident in the guardian against whom and on whose application alone the court acts. The orphan is, therefore, the subject of the duty which is incumbent upon third persons towards his guardian. A person "is the subject of a duty when the duty is not incumbent upon himself but is merely *that* about which the duty is conversant." The orphan's rights as to property being resident in the guardian, being exercised through the guardian—by the Orphan's Court, and the orphan being the subject about which the duties of the guardian are conversant, having, independently of his rights against the guardian and independently of his obligations towards the guardian, a right in such guardian, which right avails against the world at large, it follows that the orphan occupies a position analogous to that of a thing which is the subject of a similar right, and "consequently," says, Austin, Vol. 1, p. 396, Jurisprudence Lect. XV.,

"Whatever be the kind or sort of the real or personal right, he might be styled *analogically* (when considered as its subject), *a thing.*" In all such cases the jurisdiction exercised by the Orphans Court is a jurisdition *in rem*. "The phrase *in rem*, says Austin, *Ibid*, p. 380," denotes the *compass* and not the subject of the right. It denotes that the right in question avails against persons generally and *not* that the right in question is a right over a *thing*, for * * * many of the rights which are *jura* (or rights) *in rem*, are either rights over or to persons or have no subject (person or thing)." In proceedings *in rem* there are no adversary parties; and certainly the orphan cannot in any proceeding consequent upon a guardian's application to the Orphan's Court be considered as an adversary: vide *Mohr* vs. *Porter*, 51 Wis., 497; *Mohr* vs. *Maniere*, 101 U. S. S. C. R., p. 423; *Davis* vs. *Gaines*, 101 U. S. S. C., pp. 392-393. *Grignon's Lessee* vs. *Astor*, 2 How., 319. In all such cases the guardian represents the infant without any notice to him.—*Ibid.*

Again, recurring to the words of the statute, we find that in the diminution of the realty by a sale of part thereof, there *must* be an *order* of the Orphan's Court as well as an allowance or approbation, and in addition thereto the approbation of another court, which other court may be *either* the *General Court or* the *Court of Chancery*. Although it is now asserted that the Chancery Court was then considered to have the power to sell the orphan's land, which we deny, yet it will not, we assume, be asserted that the *General Court* had then or was ever supposed to have any such inherent power. If the General Court had no such inherent power, the idea that

this act intended the Orphan's Court's approbation to be coupled with an exercise of any alleged inherent power of the Chancery Court or any other court, will not have any other merit than that of novelty, for the Orphan's Court's approbation, if coupled with the general courts' approbation, gratifies the letter of the statute, and is all that is required to accomplish for the purpose of the orphan's maintenance and education the diminution of the realty by a sale of part thereof. It seems clear that Chancellor Hanson had then no such notion as has been since mooted about the alleged inherent power of chancery, and that, although himself the Chancellor of the State, the ceremoniousness of his Chancery Court, the formalism by which an infant at the breast was served with a subpœna, its flummery for babes had no such magic charm for him as to make him apply it to a proceeding *in rem*, as aforesaid, consequent upon the exercise of a ministerial power conferred by the legislature on a certain court, because that court's sessions were frequent and regular.

It seems to us that as there was no reason why a guardian should not be invested with power to sell part of the realty—as stated by Tapping Reeve—that as the guardian was invested with such power in certain cases by the British Parliament seven months before this code of Chancellor Hanson was adopted, upon such guardians obtaining the approbation of two county commissioners,—that as New Jersey, Rhode Island and other States including Massachusetts, had expressly legislated upon the subject, and had given the guardian such power for the purpose of providing for the ward's maintenance

and education that, as the power should be given, according to Reeve, to prevent frequent applications to the legislature; that as the legislature invited Chancellor Hanson to prepare the code because prior legislation was inadequate—that as the legislature found the prior legislation inadequate through the petitions addressed to it for the passage of private acts; (11 Gill. & J.) that as such petitions like that of William Wirt, prayed for the sale of the realty, it must have been intended by the legislature to give such power to the guardian, by section 10 of sub. chapter 12, otherwise the proviso of said section seems nonsensical.

Section 10 gives an express authority to the guardian to sell part of the ward's estate upon being allowed so to do by the Orphan's Court. This must be by an order of that court. There is no restriction whatever of the word "estate." Of course it might have been better to add to the word "estate" the words "real and personal" but the word estate cannot, in legal or common parlance, be confined to personal property. In fact, if it be confined in its meaning to any species of property—that property is real estate—and Bouvier says that "the proper and technical meaning of estate is the degree, quantity, nature and extent of interest, which one has in real property; as, an estate in fee, whether the same be a fee-simple or fee-tail, or an estate for life or for years, etc."—and cites Co. Litt, where Lord Coke says, 345 a., section 650:

> "State or estate signifies such inheritance, freehold, terme for years, tenancie by statute merchant, staple, elegit, or the like, as any man hath in lands or tenements, &c."

If it were not for the proviso in Section 10, it could be thence argued that real estate alone was intended, and that personalty producing any interest or income was not intended to be sold, because specific provision is made in Section 12 for the sale of personalty producing no income, and even for the mode of such sale, although no mode whatever is pointed out for the sale of income—producing personalty—and in other sections— *e. g.*, section 6, "it shall be the duty of the appraisers to examine the estate." Sec. 8, "he may with the Court's approbation, undertake the estate on his own account;" it is shown that the word estate is used in its technical sense as referring to realty alone. In the act of 1785, the following words are used: "It shall and may be lawful for the court to allow the guardian to apply a part of the principal of the personal estate," and thus by construing the act of 1798 with this, because it is *in pari materia*, it has been held that the court could allow the guardian to sell the personalty, but by the same construction the act of 1798 is now sought to be confined to personalty. In *State* vs. *Spedden*, 3 H. & J., 261, it was argued that it be extended to personalty, because the proviso showed certain additional proceedings to be necessary in case of real estate. It is strange that an act which provides for the sale of a part of the ward's estate—meaning primarily real estate—should be argued into comprehending personalty, and when this was successful, should be argued into excluding realty, because the act of 1785 said: principal of "personal estate," whereas the act of 1798, *ex industria*, drops the word "personal," and was intended to amend all prior laws, because they, including the act of 1785, were found by expe-

rience to be inadequate, and by a prior law, 1758, ch' 4, the ward, on attaining majority, was entitled to enter all the lands which had ever come into possession of the guardian in the ward's right, whereas the act of 1798 studiously avoids any such provision, evidently on the assumption that part of that ward's realty might have been sold during the ward's nonage under sect. 10 of sub ch. 12. Take the case of a ward without any personalty whatever, whose guadian had endeavored to lease the ward's realty for three years at and for the rent of $300 a year, its full rental value, the ward being a lad eighteen years of age. The guardian can lease a part for a small rent, $60.00 per annum, but for the residue can find no lessee. He finds, however, a purchaser for this part at $6,000, one-third cash, and residue two and three years, secured by lien on the property sold. To sell it in this way the lad can get the full annual value, and can get his daily bread and a collegiate education by having the cash applied to that purpose. The guardian applies to the Orphan's Court instead of the legislature. The court sees the distressing predicament of the lad. It has a ministerial power to act at once, instead of the legislature. No judicial power is exercised. It allows the guardian to diminish the capital by a sale of the part under the Court's order, because the statute prescribes that the Court may allow the guardian to exceed the income of the estate, to make use of the principal of the ward's estate, and to sell part of the estate. Does the Court do wrong to give its approbation to this diminution of the ward's principal estate? If the rent, which is a mere incident, is too paltry to provide even sufficient raiment, must the

orphan be told by the Court that it has no power to aid him, in the very face of the statute, which authorizes the Court to allow the guardian to sell a part of his estate? The guardian's application is denied, the orphan's prayer goes unanswered, simply because the Court forgets that it sometimes is called upon to perform ministerial functions. The General Court has a co-ordinate ministerial power, and likewise the Chancery Court. Let the Orphans' Court, however, give its approbation, and let the guardian's sale be under its order, and let the General Court give its approbation, and can any one say that the ministerial power conferred by the legislature has been abused? And yet Chancery has had nothing to with the premises; but if the guardian abuses his *trust*, the Chancery Court then begins its corrective process. The guardian may abuse his *trust* even though the Chancery Court gave its approbation to the sale, instead of the General Court, as above indicated; for the Chancery Court, in giving such approbation, acts ministerially, and not judicially; but if the *trust* be abused, Chancery then acts judicially and not ministerially. The guardian's *power* to sell realty is complete when he gets the approbation of the two Courts named, one of which, in any event, must be the Orphans' Court; and as the sale is *under* the *order* of the Orphans' Court, the manner of sale can be prescribed by the Orphans' Court, and the exaction of new security on part of guardian can be ordered (as stated *supra*, and as to which see *Lyman* vs. *Conkey*, 1 Metcalf, p. 320). The ulterior jurisdiction as to the guardian's trust is judicial, and this is given to the Orphans' Court, in such a manner as not to exclude

the superintending power of Chancery over the same subject.

In the opinion of the United States Supreme Court in *Hoyt* vs. *Sprague*, 103 U. S., pp. 634, 635, delivered by BRADLEY, J., it is said:

> "In this country the legislature is *parens patriæ* of infants, lunatics, and other incapacitated persons, and as such, can pass laws authorizing the sale of real estate belonging to such persons. Such laws having been frequently passed, and not prohibited by the Constitution, are within the constitutional competence of the legislature, and the passage of such laws is not exercise of judicial power, although by general laws the discretion to pass upon such cases might be confined to the court. Such laws are not judgments upon any person's rights, but they confer powers upon the exercise of which judgment may afterwards be given."

Again, in *Rice* vs. *Parkman*, 16 Mass., 329, Chief Justice Parker, delivering the opinion of the court, says:

> "Indeed, it seems absolutely necessary for the interest of those who, by the general rules of law are incapacitated from disposing of their property that a power should exist somewhere to convert lands into money, for otherwise many minors might suffer, although having property, it not being in a condition to yield an income. This power must rest in the legislature in this Commonwealth—that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves. It was undoubtedly wise to delegate this authority to other bodies whose sessions are regular and constant, and whose structure may make them more easily to understand the merits of the

> particular applications brought before them. But it does not follow that, because the power had been delegated by the legislature to courts of law, it is judicial in its character. For aught we say, the same authority might have been given to the selectmen of each town, or to the clerks or registers of the counties, it being a mere ministerial act, certainly requiring discretion and sometimes knowledge of the law for its due exercise, but still partaking in no degree of the characteristics of judicial power."

See, also, *Watkins* vs. *Holman*, 13 Peters, 63, where the Supreme Court says that the legislature may authorize a guardian to convey the lands of an infant, and, indeed, that it may give the capacity to the infant himself to convey them. That the idea that it cannot be done, except through the decree of a court of chancery, is novel and unfounded.

In the present controversy it will not be necessary to inquire for the reason which the legislature of Maryland had in giving chancery a co-power to approve and in withholding a co-power to sell. It may be because the record of a court of chancery (and for the same reason the general court being a court of general jurisdiction, whose proceedings were fully recorded) would better afford evidence as to the transfer of title. The private act of the legislature is, of itself, an assurance.

It has been stated that the Maryland courts have not done this and have not done that, and Maryland lawyers have not done this or that. We think the pertinent inquiry here is what have District of Columbia lawyers done, what have they thought, how have they practiced, how have its courts acted?

The decisions of the courts of Maryland, upon the construction of local statutes (made since the cession of the District of Columbia) are not binding in the courts of the District of Columbia, or in the Supreme Court of the United States on the construction of a Maryland statute passed before the cession. The courts of the District of Columbia and the Supreme Court of the United States are not to be controlled by such decisions of Maryland courts, as they would be by the decisions of State courts upon State statutes affecting local rights and interests.

> *Wallingsford* vs. *Allen*, 10 Pet., 593, construing act of Md., 1796, as to manumission of slaves, the Sup. Ct. U. S. holding differently from the Md. courts as to whether *children* could be manumitted.

To same effect see—

> *Phillips* vs. *Negley*, 117 U. S., p. 678.
> *Fenwick* vs. *Chapman*, 9 Pet., 476–477.
> *Russell* vs. *Allen*, 107 U. S., 163–171 citing.
> *Ould* vs. *Washington Hospital*, 95 U. S., p. 303.

The bill of exceptions itself exhibits nearly one hundred cases in which the Orphan's Court allowed a guardian to diminish the realty by a sale under that court's order, with the co-approval of the Chancery Court, and this practice has been uniform, and no decision in Maryland or the District can be found against this practice. In one case, that of Matilda Ratcliff, Chancery Rules 4, No. 398, we find that a bill in equity had been filed by the guardian under the act of Congress of 1843, on the 25th day of March, 1845, vide Chancery Rule IV., No. 362, and that

the bill was dismissed, and afterwards the proceedings No. 398 were instituted for the sale by the Orphans' Court. The record shows that the late eminent lawyer, James M. Carlisle, not only conducted some of these proceedings, but was the purchaser of property sold by the Orphans' Court in case 780, Chancery Rule V. We find that the learned, industrious and pains-taking Wm. Redin, one of the best real estate lawyers this District has ever seen, conducted some of the proceedings, and when auditor of the Court, made a report in the case of *Jardine* vs. *Favier*, No. 1253, Equity Rule V., about this very property in controversy, which was filed May 25th, 1857, and in which he says:

> "I do not understand the proceedings under the act of 1785, C. 72, S. 12, to be for the purpose of raising funds by the sale of the real estate of the minor held jointly or in common with adult heirs to be applied in the *maintenance* and education of the minors, that object is effected by proceedings in the Orphans' Court, but for the purpose of investing the proceeds of sale and applying the *income* to the minors' benefit, or suffering it to accumulate until they attain their majority."

The record shows that Wm. J. Stone, another eminent real estate lawyer, conducted some of these proceedings. Wallach, Bradley, May, C. Cox, Walter S. Cox, Hoban, Hellen, and Robert J. Brent, are a few of the many names which appear as counsel for the guardian in these proceedings.

In 1840, in the case of the infant heirs of Lewis Grant Davidson, who owned a great deal of non-productive property, Congress passed a private act au-

thorizing their mother and guardian to sell such property, and report the sales to the *Orphans' Court*, the sales to be confirmed by the *Orphans' Court* before passing title. These infants had enough for maintenance and education without such sales, and therefore could could not get a sale under the act of 1798; but the sales of their non-productive property, consisting of lots in squares 126, 127 and 163, now the most valuable parts of the city, were made by their guardian and were confirmed by the Orphans' Court without the concurrence of the Chancery Court; and the guardian's accountability for the proceeds of sale was considered as guarded by her bond already given as guardian. (U. S. Stat. at Large, Vol. VI., p. 809.) (See *Lyman* vs. *Conkey*, *supra*.) This private act was patterned after the existing practice, which was recognized by Congress by the act of March 8, 1864, giving foreign guardians right to convey to persons entitled to same by purchase of infants' lands, in same way as domestic guardians. The act of 1843, as we shall show *infra*, had no application whatever to cases of maintenance; and it is important to note that the cases in the District under the act of 1798 were more numerous after the act of 1843 than before. Although we have said that it is not so important to know what Maryland has done in the absence of any contrarient decision, yet we know that Chancellor Kilty, of Maryland, who was the first Chief Justice of the Circuit Court of the District of Columbia, in Goltier's case reported *in notis*, 3 Bland, 200, on the 18th day of December, 1810, as Chancellor, approved such an order of sale by an Orphan's Court of Maryland. Chancellor Bland, who succeeded Kilty, reports this case without a word of

disapprobation ; and on page 207, Chancellor Bland complains that the General Assembly (referring to the act of 1816) had clothed the Chancery Court "*unassociated with any other tribunal*" with a discretionary power as to the disposition of the real estate of infants. *Brodress* vs. *Thompson*, 2 H. & G., 120 ; *Hatton* vs. *Weems*, 12 G. & J., 84, recognize the power of the Orphan's Court to sell the orphan's realty. The records prior to 1816 of the Chancery Court, and of the General Court in Maryland, will doubtless show numerous cases wherein such orders of the Orphan's Court were approved by the General Court or the Chancery Court—if any one thinks it necessary for the decision of a District of Columbia court to consult them. After 1816, of course no such orders can be found, because the act of 1816, in Maryland, superseded the practice, and hence it is that Maryland lawyers of modern date are unfamiliar with the practice obtaining there before 1816, and which has obtained here for more than eighty years, and which we hope to see continued, notwithstanding the Supreme Court of the District of Columbia, being now vested with all Orphan's Court jurisdiction, it may happen that the same person who makes the order as an Orphan's Court judge, will approve of it as chancellor. We hope to see it continued, because without the act of 1798 there is no way to sell the District of Columbia realty of an infant, sole seized for the purpose of his maintenance and education, because the act of 1843, as we shall show, cannot be invoked for such a purpose.

Much has been said as to what Maryland lawyers have thought or think, or rather as to what they have failed to think or do, in the premises. Suffice

it to say, that Alexander, in his Maryland Chancery Practice, p. 213, says :

> (The General Court then being abolished,) "the Orphan's Court may appoint a guardian to an infant who has acquired an estate in any manner, and who is destitute of a testamentary or natural guardian ; and this court has, also, a general jurisdiction over natural and testamentary guardians. The power to appoint a guardian with authority to take possession of the estate has very naturally drawn to itself the power of appropriating the estate to the maintenance of the infant. The only case in which the interposition of chancery seems necessary, is where a sale of a part of the infant's real estate is required for the purposes of maintenance and education."

In Judge Griffith's celebrated Register, which was considered throughout the Union as gospel by the lawyers in full practice, before Bland was chancellor, in an article on Maryland law revised by Professor David Hoffman, of Maryland, and presumably written by him (Vol. IV, pp. 935 and 936), we find that "the leasehold estate and personalty generally of the ward may, with the approbation of the Orphan's Court, be sold by the guardian, and any other part of the real estate may be sold with joint consent of the Court of Chancery and the Orphan's Court." The practice was conceded *in arguendo* in the case of *State* vs. *Spedden*, III H. and J., 261, where counsel, unchallenged, say that the proviso of Section 10, sub. ch. 12, Ch. C. I. 1798, shows most clearly "that when real estate was not concerned, the discretion of the Orphan's Court should be uncontrolled, *exceptio probat regulam;* where the real estate was to

be disposed of for the maintenance and education of the orphan, the discretion of the Orphan's Court was to be checked by the superior discretion of the Chancery Court or General Court; but when only the principal of personal estate, the discretion of Orphan's Court is exclusive and uncontrolled." We are not, in face of all this, ready or willing to concede that the practice now sought to be upheld was not countenanced by the Maryland bar and bench. We think that the practice of obtaining the approbation of the Chancery Court by petition is all that is required. Under the act of '18 and '19, Vict. C., 43, which is an act to enable infants with the approbation of the Court of Chancery to make binding settlements of their real and personal estate on marriage, the approbation of chancery is obtained by petition. This shows that the filing of a petition would be proper practice, but that the application need not be by petition, see *Hall* vs. *Law*, 102 U. S., p. 463.

In the case at bar we have the best proof now obtainable (and good proof too) of the approbation of the Orphan's Court, application of guardian, order of Orphan's Court authorizing sale, approbation by Chancery Court on petition, of order of Orphan's Court, and in addition to all this the guardian's deed, which was not necessary, the original deed, the signature to which is acknowledged by plaintiff to be that of his mother and guardian. The learned judge who delivered the dissenting opinion in the court below, admits that, under *Grignon's Lessee* vs. *Astor*, the evidence offered was admissible. The manner in which the records of our former Chancery

Court were made and kept has received his severe censure. We are not prepared nor required to defend the negligent manner in which they were kept, but if we must believe the act of Assembly of Maryland, Dec. 1817, Ch. CXIX, the records of the Chancery Court there were far worse during a certain period. We find, however, no case in which the purchaser of property has been punished for neglect of a court's clerk.

In Mansell's appeal, the Supreme Court of the District of Columbia, in 1874, consisting of Judges OLIN, WYLIE and MCARTHUR, upheld the District of Columbia practice and applied it to the conditional sale of a mortgage. It cannot be considered gracious in a court of justice on one day to tell a man that he can buy land under its order, or even lend money upon it, and on the morrow bid him go whistle, that his security is mere air. On the contrary, it would be considered in some quarters as infamous. Happily, courts of justice have established a principle by which they are engaged to uphold any decision affecting real property, be it right or wrong, on which titles have been founded.

Lord Campbell, 15 Q. B., pp. 73, 74, says:

> "There would be no safety for property or liberty if it could be successfully contended that all lawyers and statesmen have been mistaken for centuries as to the true meaning of the act of Parliament."

And Tindal, C. J., Gurney R., p. 49, says:

> "Where would be the certainty of the law of England, if judges, acting according to their own discretion, neglecting those rules of inter-

> pretation which wise men before them have laid down, and which have been sanctioned by time, were to do that for the first time which we are now called upon to do, namely, to put a construction different from that which has been put by all who have gone before them ?"

See chapter in Sedgwick on Statutory Law, on Usage, and authorities there cited :

> "The tendency of the courts to adopt a construction already placed on the words of an Act of Parliament, appears in the following instance: Where proceedings were taken under 29 Car., II., C. 7, against a baker for baking dinners on a Sunday, the court attached the greatest weight to a decision given thirty-four years before, to the effect that this was not an offence against the statute. (*R.* vs. *Younger*, 5 T. R., 449.) 'We find one solemn determination on these doubtful expressions in the statute,' said Buller, J., in the course of his judgment (Ibid., p. 450), and as that construction has since prevailed, there is no reason why we should now put another construction on the act on account of any supposed change of convenience." Wilberforce Statute Law, pp. 148 and 149.

When a doubt arises upon the construction of the words of an Act of Parliament, it is the rule of the court to remove the doubt by deciding it; and when the court has given its decision, the point can no longer be considered doubtful. *Bell* vs. *Holtby*, 28 L. T. N. S., p. 9; 15 L. R., Equity, 178.

These principles would apply, even if the act of 1798 was doubtful. "Where the penning of a statute is dubious," says Vaughan, C. J., (Vaughan, R. 169,) "long usage is a just medium to expound it by." *Optimus legis interpres consuetudo.* The learned

judge who dissented below, whose written opinion in the case at bar is before you, says :

> "We adopt the reply of Chief Justice Dallas in *Smith* vs. *Doe*, 2 Brod. & B., 581, 'if principal and practice are at variance, practice must give away, and in this case, as in others, if the mischief is extensive, the proper remedy, if such there be, must be sought for and applied elsewhere.''

Unfortunately for Ch. J. Dallas his reply was not adopted by the House of Lords, and they did not think it necessary to go elsewhere. That case involved the validity of certain leases. There had been for a long time a certain practice as to the making of leases, which was assailed. The Court of King's Bench, in 5 M., and Selwyn, 467, upheld the leases according to the practice. Lord Ellenborough, C. J., delivered judgment—the K. B. was then composed of Ellenborough, Bayley, Holroyd and Abbot. The case was taken to Exchequer Chamber (see 1, B. & B.), and there the King's Bench was reversed. Dallas, Park, Richards and Wood, holding the leases invalid against Garrow and Graham dissenting. The case was appealed to House of Lords, and the opinions of the judges asked. In reply, Richardson, who did not sit in Exchequer Chamber, because he was counsel for one of the parties, Burrough, Holroyd, Dallas, C. J. and Justice Park (making five in all), answered that the leases were invalid—whilst Best, J., Garrow, B., Bayley, J., Wood, B., Graham B., Richards, C. B., Abbot, C. J., making seven, replied that they were valid—Wood and Richards reversing themselves. In addition Lord Chancellor Eldon and Lord Redesdale in their

opinions held the leases valid, and the House of Lords affirmed the judgment of King's Bench upholding the practice. The opinions of Lords Eldon and Redesdale are especially pertinent in regard to the practice of Courts and opinions of the bar (6 E. C. L. R., 235-300; 2 B. and B., 618). For a better reply than Ch. J. Dallas', we refer to Lord Chief Justice Willes, in *Parkhurst* vs. *Smith*, Willes, R., 339, and Lord Chancellor Talbot, in 3 P. Wm:

> "If, therefore, I could not make this consistent with the rules of law, though I humbly apprehend I plainly have, I should rather choose to put a construction on these words, contrary to the rules of law, than overturn many thousand settlements according to the maxim founded on best reason, *communis error facit jus.*" Lord Willes.

To the same effect are *Doolittle's lessee* vs. *Bryan*, 14 How., 567; *Grignon's lessee* vs. *Astor*, 2 How., 343; and *Thompson* vs. *Tolmie*, 2 Peters, 167; and *Smith* vs. *Black, trustee*, 114 U. S., p. 308, a case which came from the District of Columbia, and where this Court reversed the court below, which shows that one decision may make a rule of property law; and that to trifle with it in the future would be mischievous in the extreme. It appears in that case that in *Connolly* vs. *Belt*, 5 Cranch., C. C. 405, the Court, held by Ch. J. Cranch and Asst. Judge Morsell, decided that a sale made by an agent of a trustee under deed of trust, according to the terms and conditions and at the time and place prescribed, is a sale by the trustee; and that the court below, instead of following the old Circuit Court, decided in the case, appealed that the presence of the trustee was necessary.

Mr. Justice BLATCHFORD, delivering the opinion of this court, says:

> "We are not advised of any decision since that one (referring to *Connolly* vs. *Belt*) in the District of Columbia, holding to the contrary, until the one now before us. It was made nearly fifty years ago, and has probably been followed in some cases as a *rule of property*, which it is; and the fact that in view of it no statute has been passed by Congress requiring the personal presence of a trustee, or of both trustees, at a sale under a deed of trust, is persuasive to show that the absence of a sole trustee, or of one of two trustees, ought not to be held of itself to vitiate a sale."

As the Mansell Appeal was decided 16 years ago, and as the practice is over eighty years standing; as the devisor of defendant bought the property four years after the decision in Mansell's Appeal; as Congress has not legislated on the subject since, and as Congress gave certain powers by private act to the Davidson's heirs, patterned after this practice, as it is a rule of property, it does seem to us that (to use the language of Judge Grier, in 14 How., 517), "under such circumstances a court should be even astute in avoiding a construction which may be productive of much litigation and insecurity of titles." (See *infra Larned* vs. *Renshaw*, 37 Mo., 458, and *Chaplin* vs. *Chaplin*, 3 P. Wms., 229.)

It has been said that, as the property of the infant child of Joseph Thaw, was, under his will, a remainder interest, it could not be sold. Their interests are

vested remainders subject to be devested (*Doe* vs. *Consadine*, 6 Wall., 459; *McArthur* vs. *Scott*, 113 U. S., p. 379), but the word real estate will include such interests. The act of 1816 in Maryland refers to estates "possessed" by infants, and of course further legislation was then required to embrace remainders and include them under the provisions of said act. We did not cite any authorities to this point on the first argument, because we thought it self-evident that the term "real estates" embraced all interests in land, legal or equitable, present or future, every vested interest and even every contingent interest, if such contingent interest can be the subject of litigation. Even as to contingent interest, Dorsey, J., in *Harris* vs. *Harris*, speaking of the act of 1785, Ch. 72, Sec. 12, touching infant's joint interest or interest in common, says:

> "We concur with the solicitor of the appellant in the opinion that the executory devises to the infant defendants form no obstacle to the decree sought at the hands of the Chancellor."

Looking at the will in this case we find that the testator, Joseph Thaw, after giving a life estate in all his property to his wife, in trust for the equal benefit and maintenance of herself and of his two children, Columbia and Columbus, devises as follows: "I give and bequeth to my two children, abovenamed, Columbia and Columbus, in equal parts, to their heirs and assigns forever, all my estate, real and personal, that shall remain at and after the death of their mother, my said wife Eliza; or if either of them shall not survive their mother, then I will that the surviving one shall have the whole."

Let us consider this devise as far as the semi-colon. What do the two children take? We think that they take as tenants in common a vested remainder. The phrase, in equal parts, makes the tenancy in common. Each child has then an undivided moiety of the fee-simple estate subject to the life estate held by the mother.

Now let us look at the part of the devise after the semi-colon. Is there anything added to change this vested interest, to alter its character or quantity? The addition makes the vested interest in the child, subject during the mother's life-time to be devested in the event of that child not surviving its mother. Columbus Thaw has in his undivided moiety still a vested interest, but is given a contingent interest in his sister's vested remainder. This contingent interest was defeated by his sister's surviving his mother, and, of course, cannot enter into this controversy. Inasmuch as Columbus Thaw survived his mother, his moiety, the subject of the present action of ejectment, which before his mother's death was a vested remainder, but subject to be divested, became absolute and indefeasible in the purchaser thereof.

That the will of Joseph Thaw contemplates a division of his estate into two equal parts, in case there be any such estate left after the death of his wife, and in case his two children, Columbus and Columbia be then living, seems to admit of no doubt, although plaintiff treats the devise as a joint tenancy. That Columbus Thaw took, immediately on the death of his father, a vested remainder, as above stated, subject during the life of his mother to be devested, in the undivided moiety of the property, which moiety is the subject of this action, seems clear and beyond

any doubt, both upon principle and authority. To use the language of this Court *mutatis mutandis* in *Doe lessee* of *Poor* vs. *Consadine*, 6 Wall., 478, Columbus Thaw "was, at the date of his father's death, within every particular of the category, which, according to the authorities, creates a vested remainder.

1. The person to take was *in esse*.

2. He was ascertained and certain.

3. The estate was limited to take effect in him absolutely upon the death of his mother.

4. That was an event which must unavoidably happen by the efflux of time.

5. Nothing but his death, before the death of his mother, would defeat the remainder limit to him.

6. He had a fixed right of property on the death of the devisor. The period of enjoyment *only* was deferred and uncertain.

7. The time of enjoyment in possession depended upon the death of his mother. The right was in nowise dependent on that event.

8. Upon the death of his mother, he, surviving her, his estate before defeasible, became indefeasible and absolute.

In the case of *McArthur* vs. *Scott*, 113 U. S., pp. 378 to 381, this Court reaffirms the above case, and says: "The remainder being vested according to the legal meaning of the words of the gift, is not to be held contingent by virtue of subsequent provisions of the will, unless those provisions necessarily require it."

The plaintiff in his fifth bill of exceptions, after having stated that the interest which Columbus Thaw took in the real estate of his mother, was a remainder in fee after the termination of her life and was not an estate in possession until after the death of his mother, prays the Court to instruct the jury that "the Maryland Act of 1798, chap. C. I., sub. chap. 12, sect. 10, did not apply to remainders; and such estates of infants were not subject to sale on petition of the guardian to the Orphan's Court with the approval of the Court of Chancery, as provided in said act."

The Court will notice that plaintiff, as heretofore stated, does not assail the practice of the Orphan's Court in selling real estate in possession of the infant, either in his fifth bill or in his other bills of exceptions, but rather concedes that such practice was provided by that act. The only point raised by the refusal of the Court to instruct as above, is whether real estate not in possession of the infant, but to which he is entitled after a certain life estate is ended, can be sold according to that practice in order to keep the infant from starving or to teach him how to gain a livelihood. We did not cite any authorities on this point heretofore for the reason as aforestated; and further, because we thought that as the word estate was not qualified or limited by the act to estates in possession, there was no room for such an abridgment of the latitude of the expression used in subversion of the intent, and manifest policy of the act. As the same point, however, has been made elsewhere where similar statutes containing the exact phraseology obtain, it may not be amiss for this Court to know what respect other tribunals

have given to this quibble, and we therefore cite several cases.

In *Baxter* vs. *Baxter*, 62 Me., 543, the court held, under a statute similar to 1798, as follows:

> "The guardians of minor children are empowered to sell the real estate of their wards in certain cases. R. S. C., 71, sec. 1. The term real estate includes any and all rights thereto and interests therein. As after the decease of the father the whole estate is in the children, a sale of the right of the children with a conveyance from the father would vest the whole estate in the purchaser."

In *Cooper* vs. *Hepburn*, 15 Gratt., 563, it was objected that the court had no jurisdiction to make a sale of land; that the statute which empowers the guardian to sell real estate of infants does not authorize the guardian to have a sale of the lands of his ward when the guardian is tenant for life, and the infants have only a remainder in fee, and the court held that, "the term 'real estate' applies as well to life estates or estates in remainder, as to absolute or entire fees."

In its opinion the court further states:

> "The call for a sale of the real estate of an infant looking to his interests alone, may be just as obvious and urgent in a case where he is the owner or a portion as where he is owner of the whole of the fee, and no good reason is perceived why language broad enough to cover both cases should be construed to have conferred the power to sell in the one case and to have withheld it in the other."—"When, as here, the guardian is the owner of the life-estate, there may be considerations arising out of that fact to

quicken diligence of court in scanning the proceedings and seeing to it that the rights of the infants are fully protected; but such considerations furnish no serious grounds for supposing that cases of the kind were designed to be wholly excluded from the operation of the law under consideration."

(That the Chancery Court had no inherent power to sell the lands of infants, see *Faulkner* vs. *Davis*, 18 Gratt., 664, and *Pierce* vs. *Trigg*, 10 Leigh, 419; where all the authorities are cited on this interesting subject. See also *Thurston* vs. *Thurston*, 6 R. J., cited *supra*. In the case of *Inwood* vs. *Twyne*, Ambler, 419, which is generally cited in support of such implied power, the Court says, "The Court has no more right to change the nature of the infant's estate than trustees or guardians have." In *Dorsey* vs. *Gilbert*, 11 G. & J., 91, there was a special act of assembly, and the sections from Story cited do not sustain the text. The case of *Long* vs. *Long*, 62 Md., does not uphold any implied power, but it is a good case to show that a decision right or wrong must be respected by all other Courts when collaterally coming into question. See opinion of Judge Cox).

It has been objected in this case that there was no return or report of the sale, notwithstanding the recital in the deed of Eliza V. Thaw to Agricol Favier that the sale was reported to and confirmed by the Orphan's Court; and the Record E. N. R., No. 2, showing that such sale was approved by the Orphan's Court. It cannot be asserted that such report was not made in view of said deed and said record, but that such report is not necessary for the purchaser's protection, see *McNutt* vs. *Turner*, 16 Wall., 361.

The Act of 1843.

The attorneys for the plaintiff in error have an idea that this act was patterned after that of 1816 of Maryland; and it has been intimated that it was probably framed by the Hon. Alex. Randall, of Maryland, who was then in Congress. It has been also stated that it was not known to the District of Columbia lawyers until the Revised Statutes unfurled its contents to their gaze. In answer to such imaginings, we will state that it was well known to the District bar as soon as it was passed; that Matilda Ratcliff's case *supra* shows this: that it was printed in Brightley's Laws, vol. 1, among the other District of Columbia laws—which book was a *vade mecum* before the Revised Statutes: that the act itself was passed by Congress exactly as it was introduced by Cuthburt Powell, of Virginia, for the aid of certain Virginians then holding land in Alexandria, which was at that time part of the District of Columbia, and that the act is a literal transcript *mutatis mutandis* of the sections 16 to 23 of the 108 chapter of the Revised Code of Virginia, 1819.

In the absence of any District of Columbia decision on this act of 1843, it may be interesting to show how the Virginia courts regarded the statute of 1819:

In *Faulkner* vs. *Davis*, 18 Grattan, 664, the court, after stating that the opinion of Judge Tucker, in *Pierce* vs. *Trigg*, 18 Leigh, to the effect that chancery had no inherent power to sell infants' lands had been generally regarded as sound exposition of the law, and that the Legislature of the State had always acted in accordance with such views, first in passing

special acts and then general laws, which were extended from time to time, proceeds with a review of these general laws as follows:

> "The first of them is to be found in R. C. 1819, pp. 409, 410, Ch. 108, §§ 16–23, being a portion of the general act concerning guardians as passed February 18th, 1819," (this is exactly same as the act of Congress, 1843). "The provisions of that statute (1819) are familiar to us all, as all of us have often, no doubt, proceeded under it to obtain a decree at the suit of a guardian for the sale of the real estate of his ward. It is confined in its terms to a case in which the real estate sought to be sold belongs to the infant only, and in which no other had any interest in it, present or future, vested or contingent. The next statute on the subject is the act passed March 3d, 1827, Sup. R. C., pp. 113, et. 104, which declares that the sixteenth section of the act of 1819, before referred to, shall be held and construed to extend as well to cases where more than one infant shall be interested in the land sought to be sold as where any one or more of those interested shall be of full age."

In *Reiniker, et ux*, vs. *Streit*, 33 Gratt., 667, the court, after citing the 13tn section of Chap. 123 of Code of Virginia, 1873, which provides for sale of infants estate for *maintenance* and *education*, says: "This provision was not engrafted into our laws until it appeared in the session Acts of 1872, 3 chapter, 191. And previous thereto, no sale of an infant's real estate was ever made except under the particular provisions of the Statutes of the Rev. Code, Chap. 96, § 20, and Chap. 108, §§ 16 and 23 (the above Act of 1819), WHICH DO NOT *authorize* the *sale* of an *infant's real estate* or an PART of it, for his MAINTENANCE and EDUCATION."

These decisions confirm defendants' contention that the terms of the act of 1843 do not apply to any case of sale of lands for *maintenance and education*. The Virginia Act of 1819 was held by the highest court of the State not to apply to a case of maintenance and education; and we contend that the Act of Congress of 1843, which is the same thing as the Virginia Act, word for word, and syllable for syllable, (the caption of courts being changed) does not authorize a sale for maintenance and education, and of course does not repeal the Maryland Act of 1798, which can be invoked for sale of a part of infant's realty only for that infant's maintenance and education. Now, recurring to the Act of 1843, as originally printed, U. S. Stats., Vol. V., p. 621, we find that it is entitled "An act to provide, *in certain cases*, for the sale of the real estate of infants within the District of Columbia," and that, among other things, it enacts in Section 1, "that when the guardian of any infant shall think that the interest of his or her ward will be promoted by the sale of his or her real estate or any part thereof, it shall be lawful for such guardian to exhibit his bill for that purpose, &c;" and in Section 4, "that the proceeds of such sale shall be vested and applied for the benefit of the infant, either in the purchase of other real estate or in such other manner as the court shall think best;" and in section 5, "that if the infant shall die intestate, under the age of twenty one years, *the proceeds aforesaid, or so much thereof as may remain at his death*, shall be considered as real estate, &c.." And in Section 3, the court is authorized to "decree a sale, if it shall be proved to the court's satisfaction that the interest of the infant

manifestly requires the sale of his estates or any part thereof, and if the court shall be of the opinion that the rights of others will not be violated." The act does not negative any prior act, and has no repealing clause. Plaintiff argues that because in section 5 it declares that the proceeds of sale, *or so much thereof as may remain* at the infant's death, shall be considered real estate, the phrase, "so much as may remain," implies that part of proceeds may be expended, and justifies a diminution of the principal of the proceeds by the application of a part for maintenance and education, as under the Maryland Act of 1816.

In the first place the Maryland Act of 1816 expressly provides for such diminution for such purposes; and hence there is no analogy. Suppose a sale is decreed under the Act of 1843, and the net proceeds of sale amount to $9,000, one-third of which is cash and the residue is represented by three promissory notes payable in one, two and three years of $2,000 each. This accords with the terms of sale usually prescribed by the decree of court, and the Act of 1843 expressly provides in section 3: "It shall be lawful to decree such sale, in such manner and upon such terms of credit as the court may think right,—always retaining a lien upon such real estate for the payment of the purchase money," which shows that the credit may be taken, and seems to imply that there must be credit. Now the court in the case above stated, directs the purchase of other real estate with the $3,000 cash, or applies it for the benefit of the infant by improving vacant ground belonging to the infant, or by repairing dilapidated buildings of the infant, so as to get increased rent and thus pro-

mote his interests. The $3,000 so applied is already converted into real estate, and it would be idle to enact that it should be considered as real estate. But the infant dies before the notes given for the deferred payments all mature, or if all have matured, before any investment of the money paid on account of the notes. These notes are clearly a part of the proceeds of sale and are personal property; but the act provides that if the infant so dying shall be under age, those proceeds being only so much as remains personalty, shall be considered as real property. If they are already realty, this section has no operation. The intent of this section is palpable. The rights eventual of others as successors are thus secured as intended and are in no wise violated. Such rights would be violated by a diminution of the corpus or an alteration of the quality of the estate, and such rights are guarded by the act in requiring the apparent owners thereof to be parties to the suit, and in requiring the court to be satisfied that they will not be violated before it is empowered to decree in the premises.

Again, recurring to the first section, great stress is laid on the words, "it shall be lawful" for such guardian to exhibit a bill; and it is argued that it is not lawful for him to do otherwise; that he is precluded from exhibiting a petition to the Equity Court; that he must proceed in the future by bill alone. The act of 1843 does not say, as does the act of 1856, bill *in equity*, and as was the proceedings under the mechanic's lien act of 1859, it might be at law, although the phraseology used throughout the act, such as bill, answer, decree, would naturally indicate an equity proceeding.

The Revised Statutes, D. C., § 957, in re-enacting this section, show the legislative intent by using the word may, as follows: "The guardian of any infant *may* file a bill," &c. In 19th Wis., 689, the court says:

> "As there are different acts for the sale of an infant's estate applying to different cases, *e. g.*, for the support and education of the minor; for the investment of his property in a different way and for the payment of debts, where proceedings are had for sale they must conform to the requirements of chapter under which they are taken."

The act of 1798 applies to cases of maintenance; the act of 1843 to investment of ward's property in different ways, so as to promote his interest. If a guardian, before 1843, would file a petition in equity to diminish the real estate of a ward for that ward's maintenance and education, thereby obtaining any benefit of the plenary power and jurisdiction of the chancery court for such purpose, and if the Chancellor, under the act of 1798, is given an implied power to authorize such diminution for such purpose, the Orphan's Court concurring and ordering the sale, can it be said that this jurisdiction, which is to be exercised in conjunction with the Orphan's Court, is ousted by a subsequent jurisdiction, conferred not in all cases, but only in certain cases, not in association with another tribunal but by itself, and under its sole decree based upon proceedings commenced, not by a petition, but by a bill, which a guardian *may* file, but which he is not obliged to file, and is empowered to file only when *he* thinks the interest of his ward will be promoted?

The attorneys for the plaintiff so contend, and say that the act of 1843 repeals the act of 1798, notwithstanding the practice of the whole bar since 1843, the opinion of the Auditor in *Jardine* vs. *Favier* (*supra*), the rulings of the court, in accordance with such practice, and the decision in Mansell's appeal militate against any such construction, and notwithstanding the fact that the act of 1843 is worded only in affirmative terms and contains no repealing clause.

Maxwell on Interpretation of Statutes, says, pp. 136 and 137:

> "When the later enactment is worded in affimative terms only, without any negative, express or implied, it does not take away the earlier law. (Co. Litt. 115 a 2 Inst. 200.) The governing principle in all these cases is to construe the acts, if possible, as reconcilable and capable of co-existence. Thus an act which authorized the Quarter Sessions to try a certain offence, would not be construed as wholly repealing an earlier one which enacted that the offence should be tried by the Queen's Bench or the Assizes and not elsewhere, but would still leave the power to those courts. (Coke Litt., 115, a Lofft., 465. R. *vs.* St. George's Hanover Square, 3 Camp., 222.)"

The general rule, as stated by Lord Coke, is a later statute in the affimative shall not take away a former act, and *eo potius*, if the former be particular and the latter be general. Gregory's case, 6 R., 196. It is also thus stated by Lord Hardwicke: The rule touching the repeal of laws is *leges posteriores priores contrarias abrogant*, but subsequent acts in the affirmative, giving new penalties and in-

stituting new *methods of proceeding*, do not repeal former penalties and methods of proceeding ordained by preceding acts of Parliament without negative words.

Middleton vs. *Crofts*, 2 Atk., p. 675; see *Wood* vs. *U. S.*, 16 Peters, p. 363.

The act of 1843, prescribing a method of proceeding by bill, cannot be held to take away the former proceeding, even if you construe the words "it shall be lawful as imperative." Touching these words "it shall be lawful," a serious conflict arose upon the construction of the Church Discipline Act, 3 and 4 Vict., c. 86. That act provides that "in every case of any clerk in holy orders who may be charged with any offence, it shall be lawful for the bishop of the diocese, on the application of any party complaining thereof, or if he shall think fit, of his own mere motion, to issue a commission of inquiry." It was laid down by Wightman, J., by Sir Robert Phillmore, and by Lord Selborne, that these words were not imperative, and that the bishop had a discretionary power to issue the commission. On the other hand, Dr. Lushington, when he was acting as assessor to the Archbishop of Canterbury, stated that the bishop was bound to issue the commission; and the same view was taken by the Queen's Bench Division. But this judgment was reversed by the Court of Appeal, which held that the words "it shall be lawful" in the Church Discipline Acts were not imperative, and the judgment of the Court of Appeal was affirmed by the House of Lords. *Julius* vs. *Bishop of Oxford*, L. R. 5, App. Ca., 214, Wilberforce, p. 203.

The 1 Will., IV., c. 22, gives power to the courts of law by the words "it shall be lawful" to issue commissions for the examination of witnesses out of the jurisdiction. It is clear that this provision is intended for the benefit of suitors, yet it was held that the words were not compulsory, and that the court, in its discretion, might refuse to issue such a commission. *Costelli* vs. *Groom*, 18 Q. B., 490.

In Re Bridgman, 1 Drew and Smal., p. 169, it is said—

> "In all cases where the words 'it shall be lawful' are used in a statute with reference to a court of justice, and are not otherwise controlled, they give the court a jurisdiction, leaving the court to exercise its discretion according to the requirements of justice in each particular case."

The words "it shall be lawful" are twice used in the act of 1843. In sec. 3, where, if the court thinks that the rights of others will not be violated, it shall be lawful to decree such sale. This gives the court a discretion, and it is not bound to decree a sale.

Can it be said that the words when used in section 1 are to be otherwise construed? Section 3 hangs the phrase on the court's thinking; section 1 hangs it on the guardian's thinking. "When the guardian of any infant shall think that the interest, etc.—it shall be lawful for such guardian." Who can compel the guardian to think? Is not the guardian the sole judge as to whether or not a bill should be filed? If he be, the words are clearly permissive; and as it is a private matter and not a public duty, the revisers did right to use the word *may* in their revision, and the legislature in passing the Revised Statutes

shows that the words in the act of 1843 were not intended and could not be construed as imperative. The orphan's right to diminish his realty for maintenance under the act of 1798 does not hang upon what a guardian chooses to think. Inasmuch as the act of 1843 cannot be invoked in cases of maintenance, and inasmuch as since its passage the act of 1798 has been constantly invoked in cases of maintenance, we submit that the act of 1798 is not repealed by the act of 1843, and that the practice, since the latter act in this jurisdiction—of proceeding under the act of 1798 is valid, and after such a long series of years, whereby many titles have originated in such practice—should be upheld. In the language of the United States Supreme Court in *Beauregard* vs. *New Orleans*, 18 How., 501:

> "The undoubted exercise of jurisprudence for a long series of years, the general acquiescence of the legal profession, the universal understanding among the people as well as the courts and the bar, together form such contemporaneous interpretation of the laws relating to conflicting jurisdictions, that however doubtful it may appear on a close analysis, it cannot now be disturbed without the greatest injustice and inflicting incalculable mischief on the country."

See also, *U. S.* vs. *Moore*, 95 U. S. 763; *Beals* vs. *Hall*, 4 How., 39; *Jackson* vs. *Chew*, 12 Wh., 161, *U. S.* vs. *State Bk. N. C.*, 6 Peters, 39.

Three cases are cited by Mr. Justice HAGNER against the manner of the exercise of the jurisdiction under the act of 1798 by the Chancery Court. The cases cited, *supra*, *Mohr* vs. *Maniere*, *Mohr* vs.

Porter, Grignon's lessee vs. *Astor*, *Davis* vs. *Gaines*, showing the proceeding to be *in rem*, and that the infant need not have any notice, we think a sufficient answer to the three cases cited by the judge. We will, however, call the court's attention to those three cases, which are *Bank U. S.* vs. *Ritchie*, 8 Peters, 140; *Shriver lessee* vs. *Lynn*, 2 How., 43, and *Hunter* vs. *Hatton*, 4 Gill., 124. The learned justice says that, in *Bank* vs. *Ritchie*, the sale was ratified when the Supreme Court, on a bill of review, declared the whole proceedings invalid. In point of fact, the sale had never been ratified, and the Circuit Court itself, on the bill of review, annulled all the proceedings under original decree and declared the parties restored to their original rights. The U. S. Supreme Court affirmed this, and Chief Justice Marshall, citing in his opinion the eighth section of the act of 1785 of Maryland, under which the bill was filed, which section enacts "that all sales made by the authority of the chancellor under this act, shall be *notified* to and *confirmed* by the chancellor before any *conveyance* of the property shall be made," says (page 145):

> "This provision is totally disregarded. The sale *was never confirmed* by the court, yet the conveyance has been made. It is a *fatal* error in the decree that it directs the conveyance to be made, on the payment of the purchase money, without directing that the sale shall first be 'notified to, and approved by' the court."

As the proceeding was by bill of review, it was a direct proceeding and not a collateral attack. In such a proceeding, even if the sale had been ratified

as stated by Mr. Justice HAGNER, it is clear that the decree of the Circuit Court should have been affirmed, and the principal argument of the appellant was that a bill of review did not lie.

In Shriver, Lessee, *vs.* Lynn, a trustee was appointed by the decree of the Chancery Court, acting under a special statute upon a petition to sell certain real estate, consisting of 365 acres, named in the petition. The trustee attempted to sell a tract of 100 acres not named in the petition or decree, and which could not have been decreed to be sold because it was not liable to a sale. The U. S. Supreme Court, affirming the circuit court, held the sale to be a nullity. In that case a decision of the Court of Appeals of Maryland in Denison *vs.* Dublin (now reported in ——— ———) was cited by counsel to show that a proceeding under Sect. 4, Ch. 72, of the act of 1785—which provides that the chancellor shall appoint a trustee, &c., upon application or petition from any person interested—was a suit; and the Supreme Court says, pp. 57 and 58:

> "That the proceedings before the chancellor constituted a suit is admitted, and also that they are conformably, at least in part, to the mode of procedure in such cases. The chancellor had jurisdiction of the cause as presented by the petition, and this being the case, no advantage can be taken of errors, however gross, when the record is used collaterally."

The case of *Hunter* vs. *Hatton* shows that the decree assailed was in a proceeding under the act of 1816, which required the infant in that case to be made a party defendant and to be summoned. This was not done, and of course it could not be con-

sidered a valid proceeding under the act of 1816. It was held, however, even in this case, that the receipt of the purchase money by that infant upon marriage was a waiver of the irregularity and an estoppel both at law and in equity. The record in case at bar shows that plaintiff reaped the benefit of his mother's sale.

Mr. Justice HAGNER thinks that the practice of the Orphan's Court sale originated here about the time of the "faulty decree in *Bank* vs. *Ritchie*." We show above that the so-called faulty decree was speedily corrected by the Circuit Court on the bill of review. The original bill in that case was filed in 1825, and sale was made in 1826. In Exhibit M. R., No. 1, attached to the bill of exceptions, Case No. 47, there referred to as of petitions on Docket 1, was filed by D. M. Forrest, on March 28th, 1820, and Case 49, which should be 59, was filed May 10th, 1821, by Mr. Marbury. Although we have referred to them in the exhibit, and to no earlier cases, it must not be assumed that we have embraced in one exhibit all the cases to be found.

There are doubtless a hundred cases omitted altogether, and there must be many cases in the first quarter of the century which have been omitted. The Court, if it looks at the Petitions' Record, pp. 18, et seq., where proceedings at large were recorded, they will find Petition No. 29 (very like the petition in case at bar) filed January 8th, 1816, by Wallach, solicitor for Mary McNamara. Several of these records, it is well known, were lost during the war of 1812, and we suppose, of course, that the practice which Goltier's case shows must have existed prior to 1810 in Maryland existed here quite as soon; and we have no doubt whatever that the origin of the

practice is traceable to Alexander Contee Hanson, Chancellor of Maryland, and author of the law of 1798.

We think the three cases above referred to as cited by JUDGE HAGNER, do not show that the decree in a suit in chancery which may be *ex parte*, and oftentimes is, can be justly assailed collaterly if the suit be properly *ex parte*, and whether or not the suit be properly *ex parte*, is determined by the practice. In the case of *Larned* vs. *Renshaw*, 37 Missouri, 458, which was decided in 1866, the question whether an infant could be plaintiff in a partition proceeding, and whether all parties in interest could unite as petitioners under the Missouri statute, was considered. In *Johnson* vs. *Noble*, 24 Mo., 252, a majority of the court (2 out of 3) held that proceedings where infant was petitioner were void; and in a later case, 24 Mo., 385, held that all parties could not be petitioners.

In revieving this cause and reversing it, the court in *Larned* vs. *Renshaw* (all the judges concurring) state that the practice overruled in 24 Mo., had never been before questioned, and proceeds as follows:

> "The law concerning proceedings in partition and the titles acquired under judgments thereon, ought not to be doubtful or unsettled. The law and practice of the courts, it is believed, have been uniform throughout the State as to joining infants as plaintiffs, and conducting the suits *ex parte* where all the parties interested acquiesced and voluntarily came within the jurisdiction of the court. The practice has become firmly imbedded in the judicial annals of the State, and may be considered as a settled rule of property. On the strength of it, immense amounts

of property have been acquired in good faith, and to hold this practice and these proceedings void, would be productive of irreparable mischief." This case is approved in *Robinson* vs. *Hood*, 67 Mo., 661.

There are other points arising in the case under the bills of exceptions, but these, as shown by Judge Cox's opinion, fail if the Orphan's Court had jurisdiction to decree a sale.

GEO. F. APPLEBY,
for heirs of Maria Ritchie.